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# COMMENTS

## THE EFFECT OF EXTERNAL PRESSURES ON SENTENCING JUDGES

### I. Introduction

On the night of January 23, 1980, a party of six men met a woman while drinking together in a Massachusetts tavern.<sup>1</sup> In the tavern parking lot, one of the men joined the woman in her car and yelled to his companions to follow.<sup>2</sup> They trailed her car to a wooded area whereupon the men destroyed her car and raped, sodomized and assaulted the woman.<sup>3</sup>

On October 5, 1981, five of the men pleaded guilty to rape, unnatural rape and malicious destruction of property.<sup>4</sup> The court accepted their guilty pleas and sentenced each to a suspended term<sup>5</sup> of three-to-five years imprisonment.<sup>6</sup>

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1. Commonwealth v. Tarr, No. 76300-324, at 15 (Super. Ct. first criminal session Oct. 5, 1981).

2. *Id.* at 16. Shortly after the meeting, the woman left the bar. *Id.* at 15. Later in the evening, the men "exited the bar, were out on the sidewalk when they observed th[e] woman drive by and wave to them. She pulled her car into a parking lot across the street from the bar." *Id.* One of the defendants "ran from the group and ran over to the woman's car and entered the front seat of the car. . . ." *Id.* This individual was indicted for kidnapping, but the indictment was dismissed. *Aldoupolis v. Commonwealth*, 386 Mass. 260, 261 n.2, 435 N.E.2d 330, 331 n.2 (1982), *cert. denied*, 51 U.S.L.W. 3257 (U.S. Oct. 5, 1982) (nos. 82-203 & 82-5159).

3. Commonwealth v. Tarr, No. 76300-324, at 14-19 (first criminal session). Following these events, the victim was left to wander naked in the woods, *id.* at 17-18, "bleeding . . . , crying and . . . asking where her car was." *Id.* at 19. Some of the defendants left the scene while others remained behind forcing further sexual acts upon the victim in a promised exchange for her car. *Id.* Then "the men discussed what they were going to do with the lady [and] suggested leaving her off on the road in Holbrook with no clothes, hide her in the car, and leave her there." *Id.* One defendant drove the remaining men and the victim away from the scene and later returned with the victim to get some of her clothes before leaving her in the vicinity of a fire station, *id.* at 19-20, which she entered, "disheveled, partially clothed . . . hysterical [with] some obvious bruises about her person." *Id.* at 14.

4. *Aldoupolis v. Commonwealth*, 386 Mass. 260, 261, 435 N.E.2d 330, 331, (1982), *cert. denied*, 51 U.S.L.W. 3257 (U.S. Oct. 5, 1982) (nos. 82-203 & 82-5159). The defendants were also indicted for assault and battery. *Id.* at 261 n.2, 435 N.E.2d at 331 n.2.

5. The judge cited his reasons for the suspension of sentence as follows: the Assistant District Attorney had recommended a light sentence prior to the judge's acceptance of the guilty plea; the government's chief witness, one of the participants who had been granted immunity, had given inconsistent statements; the victim, who had attempted suicide and was under psychiatric care, *Los Angeles Times*, Nov. 27, 1981, at 22, col. 1; *N.Y. Times*, Oct. 19, 1981, at A20, col. 1, was unavailable to testify. The defendants, who were first offenders from "very close, supportive families" were contrite, though they maintained that the sexual acts were consensual; the judge concluded that neither confinement nor correctional treatment was necessary to protect the public. Commonwealth v. Tarr, No. 76300-324, at 2-4 (Super. Ct. second criminal session Oct. 9, 1981).

The news of the suspension of sentence provoked an intense public outcry. Both the judge and the governor who appointed him were criticized.<sup>7</sup> The governor, in turn, strongly rebuked the sentencing judge for his leniency.<sup>8</sup> Four days after the sentencing, the judge revoked the suspensions and reinstated the prison terms.<sup>9</sup> His stated reasons for this action did not include any reference to public or political pressure.<sup>10</sup> Defense counsel maintained that the revocation was "improper" in that the judge had succumbed to the "demands of the public and the Governor."<sup>11</sup> Although the case was vacated for resentencing on other grounds,<sup>12</sup> one legal scholar stated that "[w]

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6. *Aldoupolis*, 386 Mass. at 261, 435 N.E.2d at 331. The defendants were also given two years probation and assessed court costs of \$500 which were to be paid at the rate of \$5.00 per week over the two year term. *Id.* at 261 n.3, 435 N.E.2d at 331 n.3.

7. *See, e.g.*, Los Angeles Times, Nov. 27, 1981, at 1, col. 1 ("[H]undreds of enraged phone calls attacking the sentence[s]" were received by radio stations, the judge, the prosecutor and Governor Edward J. King of Massachusetts); N.Y. Times, Oct. 18, 1981, at A20, col. 1 ("The lightness of the sentence prompted a public outcry . . ."). Many of the phone calls made to the governor, who had appointed the judge, threatened that "they'd never vote for him again," since "he had promised law and order." Los Angeles Times, Nov. 27, 1981, at 22, col. 2. A state legislator introduced a resolution denouncing the sentences and the state caucus of women legislators issued a public statement that it was "outraged." *Id.*, col. 3.

8. N.Y. Times, Oct. 19, 1981, at A20, col. 1. The governor called a press conference on Oct. 8, 1981, during which he said: "I don't blame people for being mad. I'm 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 five dollars once a week as punishment." Los Angeles Times, Nov. 27, 1981, at 22, col. 2. He also announced that he was submitting a bill to the legislature that would allow prosecutors to appeal judicial sentences and wrote a letter to the Chief Justice of the State Superior Court asking the justice to consider whether the sentences were consistent with the court's sentencing guidelines. *Id.* The Los Angeles Times viewed these actions as political gestures. *Id.*

9. *Aldoupolis*, 386 Mass. at 261, 435 N.E.2d at 331.

10. *Commonwealth v. Tarr*, No. 76300-324, at 4-5 (second criminal session). The trial judge questioned the legality of the suspension of sentence, *id.* at 5, pursuant to a Massachusetts statute which prohibits the granting of a suspended sentence when a person is "convicted of a crime punishable by death or imprisonment for life." *Aldoupolis*, 386 Mass. at 263, 432 N.E.2d at 332. Rape is punishable in Massachusetts by imprisonment for life or for any term of years. *Id.* at 263 n.8, 435 N.E.2d at 332 n.8. The Supreme Judicial Court of Massachusetts ultimately construed the ambiguously written statute to mean that the prohibition against suspension is inapplicable to crimes which are punishable by life imprisonment or imprisonment for a term of years. Thus, the sentences originally imposed were held to be properly suspended. *Id.* at 267, 435 N.E.2d at 334. The trial judge also noted the prosecution's objection to the imposition of a suspended sentence and expressed a desire to have the case tried on the merits. *Commonwealth v. Tarr*, No. 76300-324, at 5 (second criminal session).

11. Brief for Defendants at 36, *Aldoupolis*, 386 Mass. 260, 435 N.E.2d 330.

12. *Aldoupolis*, 386 Mass. at 276, 435 N.E.2d at 338-39. The Supreme Judicial Court of Massachusetts held that although the trial judge did have the power to

are seeing a judge responding to public and political pressures that should not influence the judiciary."<sup>13</sup>

The foregoing case, *Aldoupolis v. Commonwealth*,<sup>14</sup> illustrates three potential types of pressure on a sentencing judge: public opinion, opinions voiced by influential political figures, and opinions expressed by the press. This Comment will explore the question of whether a sentencing judge may consider any of these pressures without violating the constitutional principles of procedural due process,<sup>15</sup> the proscription against cruel and unusual punishment,<sup>16</sup> equal protection,<sup>17</sup> double jeopardy,<sup>18</sup> and the common law-statutory proscription against abuse of discretion.<sup>19</sup> Emphasis will be placed on public opinion, which often parallels the voices of those least heard by the criminal justice system: the victims.<sup>20</sup>

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revise and revoke the sentences pursuant to Massachusetts law and that the principle of double jeopardy was not violated, *id.* at 268, 435 N.E.2d at 334, the defendants did not receive proper notice and an opportunity to be heard at the hearing wherein revocation took place. Therefore, the sentences were vacated and the defendants ordered to be resentenced. *Id.* at 275-76, 435 N.E.2d at 338-39. Resentencing proceedings were ultimately resumed and the defendants' motions to withdraw their guilty pleas were granted in order to preserve the double jeopardy claim. Defendants were ordered to stand trial on December 2, 1982. *Judge orders 2d rape trial for 5 men in Holbrook case*, The Boston Globe, July 15, 1982, at 1, col. 1.

13. N.Y. Times, Oct. 19, 1981, at A20, col. 2. It should be noted that Rule 29 of the Massachusetts Rules of Criminal Procedure provides that "[t]he trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence . . . may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done." MASS. ANN. LAWS, R. CRIM. P. 29(a) (Law. Co-op. 1979) (emphasis added). The Supreme Judicial Court of Massachusetts held that the revocation of the suspended sentences was proper, pursuant to this statute. See note 10 *supra*.

14. 386 Mass. 260, 261, 435 N.E.2d 330, 331 (1982), *cert. denied*, 51 U.S.L.W. 3257 (U.S. Oct. 5, 1982) (nos. 82-203 & 82-5159).

15. "No person shall be . . . deprived of life, liberty, or property, without due process of law" by the federal government. U.S. CONST. amend. V. The fourteenth amendment similarly binds the states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

16. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," U.S. CONST. amend. VIII, and is applied to the states pursuant to the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

17. The fourteenth amendment provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

18. The fifth amendment provides that "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb," U.S. CONST. amend. V, and is applied to the states pursuant to the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

19. See note 113 *infra* and accompanying text.

20. See text accompanying note 221 *infra*. Victims of crime commonly hail from such disparate groups as the elderly, women, blacks, and the poor. L. FORER,

Following this analysis, the sources and effects of external pressures on a sentencing judge will be examined, including: pressure from organized citizens' groups, the press, the electorate, politicians, general community condemnation, and victims of crime. Throughout this discussion, a differentiation will be made between those pressures, the consideration of which would violate established principles of law, and those which would enhance the sentencing process through increased judicial awareness. This Comment concludes by arguing that (1) a judge can and should be fully cognizant of diverse public opinion concerning the seriousness of an offense, validly expressed pursuant to the first amendment freedoms of speech and press,<sup>21</sup> without incurring constitutional violations, and (2) increasing judicial awareness of the impact of a crime on a victim's life is one step toward giving voice to large segments of the community who are routinely targeted for specific types of crimes.<sup>22</sup>

## II. Limitations on Judicial Discretion in Sentencing: The Effect of Public Opinion

In theory, sentencing is of great significance because it represents the price society exacts for particular crimes.<sup>23</sup> In the indeterminate

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CRIMINALS AND VICTIMS, A TRIAL JUDGE REFLECTS ON CRIME AND PUNISHMENT 36, 225-26 (1980); RESEARCH & FORECASTS, INC., THE FIGGIE REPORT ON FEAR OF CRIME: AMERICA AFRAID, PART I: THE GENERAL PUBLIC 36-37, 42 (1980) [hereinafter cited as FIGGIE REPORT]. Concrete fear of specific violent crimes among such groups as blacks, women, the young, and inhabitants of large cities is statistically justified by the high rates of victimization of these groups. FIGGIE REPORT, *supra*, at 36-37. The high rates of victimization are based on murder statistics for the young and blacks, *id.*, and rape statistics for women. *Id.* at 37. The highest degree of "formless fear" of vague dangers in their everyday environments is experienced by the old, who suffer "noticeable rates of victimization." *Id.* at 52, 55. For an example of the elderly comprising a group routinely targeted for mugging, see text accompanying notes 164-70 *infra*.

21. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," U.S. CONST. amend. I, and is applied to the states pursuant to the fourteenth amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

22. For a discussion of victim legislation see text accompanying notes 229-35 *infra*.

23. *People v. Perry*, 36 N.Y.2d 114, 119, 324 N.E.2d 878, 880, 365 N.Y.S.2d 518, 520-21 (1975). In practical terms, sentencing is a crucial stage in the criminal process because most cases are plea-bargained. *Santobello v. New York*, 404 U.S. 257, 264 n.2 (1971) (Douglas, J., concurring) (90.2% of federal convictions in 1964 based on plea of guilty); Pugh & Carver, *Due Process and Sentencing From Mapp to Mempa to McGautha*, 49 TEX. L. REV. 25, 26 (1970) ("[a]pproximately ninety percent of those convicted of felonies plead guilty"). "Plea bargaining," recognized and encouraged by the United States Supreme Court as "an essential component of the administration of justice," *Santobello*, 404 U.S. at 260, has been defined as an "exchange of a plea of guilty for some anticipated benefit from the prosecutor." Note, *Procedural*

sentencing<sup>24</sup> scheme still prevalent today,<sup>25</sup> a sentencing judge has broad discretion<sup>26</sup> in determining the sentence to be imposed<sup>27</sup> and is largely unfettered in the sources and types of information that may be considered.<sup>28</sup> Indeterminate sentencing and broad judicial discretion are based on the ideal of rehabilitation of the offender.<sup>29</sup> Recently, interest in the idea of "desert"—that the severity of the penalty should depend on the seriousness of the offense—<sup>30</sup> has revived.<sup>31</sup> These two concepts, the tailoring of sentences to the individual offender<sup>32</sup> and

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*Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 829 (1968). See also *Perry*, 36 N.Y.2d at 119, 324 N.E.2d at 880, 365 N.Y.S.2d at 520-21 ("in light of the overwhelming percentage of dispositions via plea negotiation, guilt or innocence may not be deemed by some defendants to be of prime concern").

24. An "indeterminate sentence" refers "to any sentence of confinement in which the actual term to be served is not known on the day of judgment but will be subject, within a substantial range, [set by statute], to the later decision of a board of parole or some comparable agency." Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 29 (1972).

25. See A. CAMPBELL, LAW OF SENTENCING § 3, at 13 (1978) ("[The] rehabilitative sentencing philosophy motivates what is today the most common sentencing system in this country: the indeterminate sentence.") (footnotes omitted); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT II (1976) ("The dominant sentencing structure currently employed in the United States is based on the indeterminate sentence, so-called because it is characterized by wide separations between the legislatively authorized minimum and maximum sentences for generally defined crimes."). For a general discussion of determinate sentencing and its growing popularity see A. CAMPBELL, *supra*, §§ 31-33 (1978 & Supp. 1982). See also Gardner, *The Determinate Sentencing Movement: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103, 1104 ("Calls for determinate sentencing systems, already heeded by several legislatures, abound and almost certainly will increase.") (footnotes omitted).

26. Prosecutorial and parole board discretion are beyond the scope of this Comment. For a discussion of the sharing of sentencing power by prosecutors, judges and the parole board, see Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 735-36 (1980).

27. *United States v. Tucker*, 404 U.S. 443, 446 (1972) (case remanded to trial court for reconsideration of defendant's sentence which was based in part on prior convictions obtained in violation of defendant's right to counsel).

28. *Id.* See also *Williams v. New York*, 337 U.S. 241, 245 (1949) (death sentence for convicted murderer affirmed although information as to defendant's previous criminal record considered without permitting him to confront or cross-examine witnesses on that subject); FED. R. CRIM. P. 32(c)(2).

29. A. CAMPBELL, *supra* note 25, § 3, at 13; Frankel, *supra* note 24, at 29. In criticizing the goal of rehabilitation via imprisonment, however, Judge Frankel stated: "we have no right to keep people confined ostensibly to rehabilitate them when we lack the means of rehabilitation." *Id.* at 34.

30. Von Hirsch, *Doing Justice: The Principle of Commensurate Deserts*, in SENTENCING 243 (H. Gross & A. Von Hirsch eds. 1981).

31. SENTENCING 237 (H. Gross & A. Von Hirsch eds. 1981).

32. "[T]he punishment should fit the offender and not merely the crime." *Williams*, 337 U.S. at 247 (citing *People v. Johnson*, 252 N.Y. 387, 392, 169 N.E. 619, 621 (1930)). See also *United States v. Hogan*, 489 F. Supp. 1035, 1036 (W.D. Wash.

consideration of the relative gravity of the offense, represent two opposing forces in the sentencing equation.<sup>33</sup> If indeterminate sentencing within statutory limits is chiefly concerned with the offender and not the offense,<sup>34</sup> the inclusion of "current community consensus about the relative gravity of offenses"<sup>35</sup> as a factor in judicial sentencing decisions may help to offset any imbalance. At the same time, the defendant must be protected by constitutional rights which operate to curtail a sentencing judge's discretion. These include the prescription for due process and equal protection and the prohibitions against cruel and unusual punishment and double jeopardy.<sup>36</sup> In addition, a judge's sentencing decision may not reflect an abuse of discretion.<sup>37</sup> As long as these principles are respected, an appellate court generally will not disturb a lower court's sentencing determination.<sup>38</sup>

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1980) ("The justification for this policy [of broad judicial inquiry in indeterminate sentencing] is the strong public interest in imposing sentences based upon a complete evaluation of each individual offender and designed to aid in his particular rehabilitation.").

33. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("Justice generally requires consideration of . . . the circumstances of the offense together with the character and propensities of the offender."); *McCleary v. State*, 49 Wis. 2d 263, 271, 182 N.W.2d 512, 517 (1971) ("It is essential that a sentencing court consider the nature of the particular crime . . . and the personality of the criminal."); Von Hirsch, *supra* note 30, at 247 ("An often-repeated theme in the literature has been that the offender's disposition should be decided by 'balancing' the different aims of punishment . . ."); Wechsler, *Correctional Practices and the Law*, 17 FED. PROBATION 16, 17-18 (1953). But see Von Hirsch, *supra* note 30, at 247 ("When the different objectives are in conflict, however, saying they should be 'balanced' against each other does not offer a principled way of resolving the issue. One escapes this difficulty by giving the commensurate-deserts principle prima-facie controlling effect.").

34. R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* 28 (1979) ("The indeterminate sentence is, by definition, not concerned with the offense but with the offender; any relation of the actual sentence to the severity of the offense should be totally coincidental"). See text accompanying note 133 *infra*.

35. ABA Statement Concerning Bail, Sentencing and Corrections, submitted to the Attorney General's Task Force on Violent Crime 5 (1981). In urging the legislative establishment of Sentencing Guideline Drafting Agencies which would be empowered to promulgate presumptively appropriate sentencing ranges within statutory limits, the ABA stated: "we feel that sentencing guidelines should seek to reflect the current community consensus about the relative gravity of offenses." *Id.*

36. See generally A. CAMPBELL, *supra* note 25, §§ 41-68 (1978 & Supp. 1982) (constitutional considerations). The United States Supreme Court has never held that "the full panoply of constitutional rights" applies to the sentencing process. *Perry*, 36 N.Y.2d at 119, 324 N.E.2d at 880, 365 N.Y.S.2d at 521.

37. A. CAMPBELL, *supra* note 25, § 69 (1978 & Supp. 1982).

38. The general rule is that a federal appellate court will not review a sentence imposed within statutory limits. See, e.g., *Tucker*, 404 U.S. at 447; Note, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 DUKE L.J. 1357, 1357 [hereinafter cited as Note, *Appellate Review*]. A few state courts allow appel-

### A. Due Process

The preservation of a defendant's procedural due process rights is less clearly defined at sentencing than at trial,<sup>39</sup> because the rules of evidence need not be followed during sentencing.<sup>40</sup> A judge may consider a broad range of information regarding "the convicted person's past life, health, habits, conduct, and mental and moral propensities"<sup>41</sup> and any other information it requires,<sup>42</sup> even though the information is obtained outside the courtroom from individuals

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late review of sentencing. Note, *An Excessively Long Sentence Constitutes Cruel and Unusual Punishment*—Davis v. Davis, 16 WAKE FOREST L. REV. 821, 825 (1980) [hereinafter cited as Note, *Excessively Long Sentence*]. In New York, an intermediate appellate court may modify a judgment upon a determination that a sentence imposed is illegal, unduly harsh or severe. N.Y. CRIM. PROC. LAW § 470.15(2)(c) (McKinney 1971). See also Hopkins, *Reviewing Sentencing Discretion: A Method of Swift Appellate Action*, 23 U.C.L.A. L. REV. 491, 492 (1976) ("New York is one of the jurisdictions which entertains appeals by convicted criminal defendants attacking the sentence itself.").

Some circuit courts circumvent the rule against appellate review. The Second Circuit, for example, uses two rationales to vacate excessively harsh sentences: that some aspect of the sentencing procedure violated due process, and that the trial judge abused his discretion. Comment, *Appellate Review of Criminal Sentences—The Backdoor Approach*, 44 BROOKLYN L. REV. 975, 979-80 (1978). The Fifth Circuit has stated that while it will not review the severity of a sentence within statutory limits, it will carefully scrutinize the "judicial process" by which punishment was imposed. See, e.g., United States v. Cimino, 659 F.2d 535, 537 (5th Cir. 1981); United States v. Clements, 634 F.2d 183, 186 (5th Cir. 1981); Herron v. United States, 551 F.2d 62, 64 (5th Cir. 1977); United States v. Cavazos, 530 F.2d 4, 5 (5th Cir. 1976). Because a district court judge is not required to state the reasons for imposing a particular sentence, it may be difficult to maintain an effective challenge to a sentence. The Second Circuit has recognized the benefit of stating the reasons on the record, though such statement is not constitutionally required. United States v. Velazquez, 482 F.2d 139, 142 (2d Cir. 1973).

Because indeterminate sentencing often results in great disparities in sentences, the general rule of non-reviewability of sentencing decisions has come under increasing attack. See, e.g., M. FRANKEL, CRIMINAL SENTENCES, LAW WITHOUT ORDER 75-85 (1973); Burr, *Appellate Review As a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?* 33 U. PITT. L. REV. 1, 8-10 (1971); Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207, 216-19 (1971); DeCosta, *Disparity and Inequality of Criminal Sentences: Constitutional and Legislative Approaches to Appellate Review and Reallocation of the Sentencing Function*, 14 HOW. L.J. 29, 39-51 (1968); Frankel, *supra* note 24, at 23-28; Hopkins, *supra*, at 491-92; Sobeloff, *The Sentence of the Court: Should There Be Appellate Review?* 41 A.B.A. J. 13, 16-17 (1955); Comment, *supra*, at 977-78; Note, *Appellate Review*, *supra*, at 1357; Casenote, United States v. Grayson, *Questionable Support for Broad Judicial Discretion in Sentencing*, 12 J. MAR. J. PRAC. & PROC. 407, 424-45 (1979). For data on state-to-state disparities in prison sentences, see *Huge Disparities in Jail Time*, Nat'l L.J., Feb. 23, 1981, at 1, col. 1.

39. A. CAMPBELL, *supra* note 25, § 41, at 150-51 (1978).

40. Williams v. New York, 337 U.S. 241, 247 (1949).

41. *Id.* at 245.

42. FED. R. CRIM. P. 32(c)(2).



whom the defendant has not been allowed to confront or cross-examine.<sup>43</sup> However, if the information relied upon in sentencing is materially untrue, the Supreme Court has held such reliance to be in violation of a defendant's right to due process.<sup>44</sup>

Consideration of public opinion by a sentencing judge<sup>45</sup> may endanger a defendant's due process rights if such opinion represents an aggravating factor which the defendant has no opportunity to deny or explain.<sup>46</sup> It could be argued that due process demands would be met if the defendant were provided an opportunity to rebut such public opinion.<sup>47</sup> This solution is simplistic, however, unless differentiations are made among the many forms that public opinion may take.<sup>48</sup>

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43. *Williams*, 337 U.S. at 245. In response to the need of the sentencing judge for information regarding the background, character and conduct of the convicted defendant, Congress has enacted legislation that specifies that: "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3577 (1976); *see also* *United States v. Hogan*, 489 F. Supp. 1035, 1036-37 (W.D. Wash. 1980) (Congress enacted legislation codifying judge's authority to conduct broad inquiry). The probation service of the court assists the sentencing judge by preparing a presentence investigation report which contains the defendant's prior criminal record, information about his characteristics, financial condition and the circumstances affecting his behavior and such other information as may be required by the court. FED. R. CRIM. P. 32(c)(2). Presentence reports required by state law are usually similar. *See, e.g.*, N.Y. CRIM. PROC. LAW § 390.30(1), (3) (McKinney 1971). *See* text accompanying note 233 *infra* for amendment of § 390.30(3) regarding victim impact statement, effective Nov. 1, 1982.

44. *United States v. Tucker*, 404 U.S. 443, 447-48 (1972) (remand for resentencing affirmed because sentence of defendant convicted for bank robbery was based on previous convictions which were constitutionally invalid); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (conviction for burglary and armed robbery reversed because uncounseled defendant was prejudiced by misinformation concerning prior record).

45. While it is often stated that public sentiment is an improper factor to be examined in sentencing, *see, e.g.*, *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); *People v. Sumner*, 40 Ill. App. 3d 832, 839, 354 N.E.2d 18, 24 (App. Ct. 1976); *State v. Humphreys*, 89 N.J. 4, 15, 444 A.2d 569, 574 (1982), some commentators express the contrary view. Burr, *supra* note 38, at 10; Wechsler, *supra* note 33, at 18.

46. In the context of a non-capital crime, the New York Court of Appeals has ruled that the key to due process in all sentencing "is whether the defendant has been afforded an opportunity to refute those aggravating factors which may have negatively influenced the court." *People v. Perry*, 36 N.Y.2d 114, 119, 324 N.E.2d 878, 880, 365 N.Y.S.2d 518, 521 (1975). A defendant is denied due process when the death sentence is imposed on the basis of information which he has had no opportunity to deny or explain. *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

47. New York has recently amended the statute regarding the purposes of the penal law "to provide for an appropriate public response to particular offenses, including consideration of the consequences . . . for the victim . . . and the community." *See* N.Y. PENAL LAW § 1.05(5) (McKinney Supp. 1982-1983). If such information were presented at a sentencing hearing, presumably, the defendant would have an opportunity to rebut any information he contests. The court may hold presentence

In *Moore v. Dempsey*,<sup>49</sup> the Supreme Court held that a guilty verdict resulting from a trial dominated by "mob rule," where "counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion," was invalid for noncompliance with due process of law.<sup>50</sup> In recent cases, community sentiment has been manifested more subtly, so that no due process violation has been found.

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conferences to resolve any discrepancies in information received or to assist the court in consideration of any relevant matter. N.Y. CRIM. PROC. LAW § 400.10 (1) (McKinney 1971). The court may advise anyone present of the factual contents of any report or memorandum and "afford any participant an opportunity to controvert or to comment on any fact." *Id.* § (3). New York also amended the statute regarding the scope of the presentence report to include, when relevant to the recommendation or court disposition, a victim impact statement. N.Y. CRIM. PROC. LAW § 390.30(3) (McKinney SUPP. 1982-1983). The sentencing court may, in its discretion either make the presentence report available to the defendant or withhold disclosure of all or part of it. *Perry*, 36 N.Y.2d at 120, 324 N.E.2d at 881, 365 N.Y.S.2d at 522. The court may withhold disclosure when the information is not relevant to a proper sentence; when it is diagnostic in nature and might disrupt a program of rehabilitation; when the information has been obtained on a promise of confidentiality; or when disclosure would not be in the interest of justice. N.Y. CRIM. PROC. LAW § 390.50(2) (McKinney 1981). Although the inclusion of a victim impact statement is premised on its relevancy to sentencing, *id.* § 390.30(3) (McKinney Supp. 1982-1983), it would appear that if the victim supplied information on a promise of confidentiality or disclosure was not in the interest of justice, a defendant would have the opportunity to see the information in the presentence report and have the opportunity to rebut it.

At the federal level, a court will permit a defendant, upon request, to read the presentence report but may withhold disclosure of information which might disrupt a program of rehabilitation or result in harm to the defendant or others, or which was obtained by a promise of confidentiality. FED. R. CRIM. P. 32(c)(3). See text accompanying note 235 *infra* for a discussion of victim impact information in federal presentence reports. Once a defendant is given access to the report, the Second Circuit has held that the defendant must be given adequate time to prepare a rebuttal to any inaccuracies contained therein. *United States v. Robin*, 545 F.2d 775, 780 (2d Cir. 1976). See generally Note, *Appellate Review*, *supra* note 38, at 1371-74; Note, *supra* note 23, at 835-41, for a discussion urging disclosure of presentence reports as a matter of due process and policy.

48. For example, mob domination of a trial and sentencing blatantly violates a defendant's right to due process of law. *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923). The propriety of judicial consideration of other forms of public opinion, such as witness testimony during a sentencing hearing, depends on the circumstances. See text accompanying notes 145-46 *infra*. The submission of letters or petitions to a sentencing judge are other prerogatives of the public, though a judge may decide not to read the submitted material. See text accompanying notes 148-49 *infra*. An indirect mode of expressing public opinion is exemplified in the court observer movement. See text accompanying notes 162-72 *infra*. Recognizable segments of the public, such as the elderly, make their presence felt in an effort to remind the judge that they are the potential victims of a particular type of crime. See text accompanying notes 168-70 *infra*.

49. 261 U.S. 86 (1923).

50. *Id.* at 91. The Supreme Court reversed and remanded for a hearing before the district court to determine whether the alleged facts were true and whether they

A New Jersey trial court has taken judicial notice of a community's anxiety over a defendant's "drug involvement" because he was a school teacher.<sup>51</sup> The Supreme Court of New Jersey upheld the conviction but disapproved of the trial court's reference to community anxiety. The court referred to the rule against mob domination, and stated that "[w]hether this 'public anxiety' arose from a general apprehension about drug abuse . . . or from the focused outrage over this school teacher's misconduct, such factors should not have influenced the trial judge's deliberations."<sup>52</sup> The trial judge's decision was upheld, however, because it was "fundamentally founded upon an evaluation of the whole person of the defendant, not on the community's viewpoint."<sup>53</sup> Thus, the court found no violation of due process.<sup>54</sup>

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could be sufficiently explained so as to leave the state proceeding undisturbed. *Id.* at 92.

The appellants were five blacks who were convicted of first degree murder and sentenced to death by the Supreme Court of Arkansas. *Id.* at 87. They were accused of killing a white male based on facts showing that a group of white males attacked a group of black people assembled in church. *Id.* The trial lasted 45 minutes and the jury brought in their guilty verdict in less than five minutes. *Id.* at 89. According to affidavits, "no juryman could have voted for an acquittal and continued to live in Phillips County, and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob." *Id.* at 89-90.

51. *State v. Humphreys*, 89 N.J. 4, 8-9, 444 A.2d 569, 571 (1982) (defendant pleaded guilty of possessing marijuana).

52. *Id.* at 15, 444 A.2d at 574. "Judicial recognition of or action upon public opinion against a particular defendant cannot be tolerated in our criminal justice system." *Id.*

53. *Id.*

54. However, the dissent noted that although the majority conceded "that the trial court's decision was in part premised on the inappropriate factor of hostile public opinion," it ignored this transgression by deferring to its disposition. *Id.* at 18, 444 A.2d at 576 (Pashman, J., dissenting). The dissent expressed the view that "reliance on public pressure . . . was a clear denial of due process." *Id.* at 17, 444 A.2d 575 (Pashman, J., dissenting).

An interesting due process problem is evidenced by a Texas rule of criminal procedure which prohibits the prosecution from informing the jury that the community wants an accused convicted. *See Crawford v. State*, 511 S.W.2d 14, 16-17 (Tex. Crim. App. 1974); *Bothwell v. State*, 500 S.W.2d 128, 130 (Tex. Crim. App. 1973); *Perbetsky v. State*, 429 S.W.2d 471, 475 (Tex. Crim. App. 1968). Though one prosecutor argued that "some of the people of McLennan County are wanting juries to get tough with some of these defendants and to let them know that the people of McLennan County don't appreciate all of this crime that has been going on in the county," *Crawford*, 511 S.W.2d at 16-17, the appellate court held that the rule was not violated because the prosecutor did not say what the whole community wished about this particular defendant. *Id.* at 17. In another case, the prosecutor stated to the jury that "[s]ociety demands that the Defendant be punished." *Perbetsky*, 429 S.W.2d at 475 (conviction of defendant of rape of a 59-year old woman by force, threats and fraud affirmed). In affirming the conviction, the appellate court found that the prosecutor's statement did not violate the rule but was merely "a plea for law enforcement." *Id.* Although these statements seem to exemplify the type of prosecutorial misconduct that the rule was meant to prohibit, they were held not to be

At the opposite end of the spectrum from mob rule is the solicitation of public opinion by the judiciary. In an Illinois case, a trial judge sought discussion regarding the punishment to be imposed with other judges and members of the public<sup>55</sup> to determine "whether a sentence of probation or conditional discharge would 'deprecate the seriousness' of the offense."<sup>56</sup> Although the Appellate Court of Illinois conceded that "[a]n argument can be made that the best way to do this is to talk to others to sample public opinion,"<sup>57</sup> the court held that private conversations with members of the public were improper and remanded for resentencing.<sup>58</sup> The court's major objection to this procedure was that it deprived the defendant of the opportunity to challenge the bias of the information obtained.<sup>59</sup> Presumably, if the defendant had been given such an opportunity, the appellate court would not have objected.<sup>60</sup>

A judge may become aware of public sentiment in sentencing without necessarily violating due process. The foregoing cases illustrate that although mob domination of a trial and sentencing clearly violates due process, the mere consideration of community sentiment by a sentencing judge may be acceptable where: (1) the sentence is fundamentally founded upon a complete evaluation of the defendant rather than the community's viewpoint, and (2) a defendant is given an opportunity to challenge any biased community sentiment or opinion regarding sentencing.<sup>61</sup>

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violative of the rule or of due process. Examples of arguments by the prosecutor which were found to offend the rule were: "[t]he people of DeSoto are asking the jury to convict this defendant," *Crawford*, 511 S.W.2d at 17, "[t]he people of Nueces County expect you to put the man away," *id.* These statements specified that the particular community as a whole wanted a conviction. *Id.*

55. *People v. Sumner*, 40 Ill. App. 3d 832, 354 N.E.2d 18 (App. Ct. 1976).

56. *Id.* at 839, 354 N.E.2d at 24.

57. *Id.*

58. *Id.*

59. *Id.* See also *United States v. Robin*, 545 F.2d 775, 780 (2d Cir. 1976) ("a defendant must be given adequate time to prepare and present a rebuttal to information which he contests").

60. *Contra* *People v. Short*, 66 Ill. App. 3d 172, 383 N.E.2d 723 (App. Ct. 1978). "Although the [*Sumner*] court's major objection to this procedure was that it deprived the defendant of an opportunity to challenge the bias of the information obtained, we believe such evidence is incompetent even if elicited during the sentencing hearing itself." *Id.* at 181, 383 N.E.2d at 730.

61. Judicial awareness of community sentiment regarding the gravity of a particular offense may prevent a court's trivialization of the offense, in accordance with the theory of commensurate deserts. Von Hirsch *supra* note 30, at 243-55. In *State v. Chaney*, 477 P.2d 441 (Sup. Ct. Alaska 1970), the Supreme Court of Alaska castigated the trial court for its lenient sentencing of a defendant who, with a companion, beat, raped and robbed the victim. *Id.* at 445. The court found that the sentence

## B. Cruel and Unusual Punishment

Another constitutional limitation on judicial discretion in sentencing is that a sentence may not violate the eighth amendment proscription against "cruel and unusual punishment".<sup>62</sup> The Supreme Court has held that "cruel and unusual punishment" exists when a sentence "shocks the conscience and sense of justice of the people."<sup>63</sup> Inherent in this test is the principle that the punishment must be acceptable to contemporary society.<sup>64</sup> A criticism of the contemporary standards test is that "it shifts the moral responsibility for a sentence from the consciences of the judges to the 'common conscience' "<sup>65</sup> and that "such a standard—the community's attitude—is usually an unknowable."<sup>66</sup> The Second Circuit envisioned cases where the general public's sentiment might be knowable, but concluded that, generally, such sentiment resembles a "slithery shadow."<sup>67</sup> Given today's extensive use of the media as a means of communication and dialogue,<sup>68</sup> the prevalence of public opinion polls on a variety of

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imposed did not achieve the objective of reformation of the accused, nor did the sentence effectuate "the goal of community condemnation, or the reaffirmation of societal norms." *Id.* at 447. The court stated that the leniency of the "sentence imposed could lead to the conclusion that forcible rape and robbery are not reflective of serious antisocial conduct." *Id.*

62. Originally, "cruel and unusual punishment" was interpreted as a prohibition against barbarous methods of punishment or execution. *Gregg v. Georgia*, 428 U.S. 153, 170 (1976).

63. *Furman v. Georgia*, 408 U.S. 238, 360 (1972) (per curiam) (imposition and execution of death penalty in these cases held to constitute cruel and unusual punishment in violation of eighth and fourteenth amendments) (Marshall, J., concurring)(citing *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952)).

64. *Furman*, 408 U.S. at 277 (1972) (Brennan, J., concurring). The cruel and unusual language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 329 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Though "the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives," *id.* at 437 (Powell, J., dissenting), legislative authorization does not establish acceptance. *Id.* at 279 (Brennan, J., concurring). The court must determine whether contemporary society considers a challenged punishment which is available by statute to be acceptable in its particular use. *Id.* at 278-79 (Brennan, J., concurring).

65. *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952) (defendants' conviction of conspiracy to violate Espionage Act by communicating secret information to Russia affirmed and sentence of death not "cruel and unusual punishment").

66. *Id.*

67. *Id.*

68. See note 174 *infra* and accompanying text.

issues<sup>69</sup> and the many ways in which public opinion is expressed,<sup>70</sup> this assumption is probably no longer valid.

General public opinion often parallels the opinions of those who have an interest in particular sentencing decisions—the victims of crimes.<sup>71</sup> This segment of the population has been traditionally ignored by legislators.<sup>72</sup> If the hallmark of a cruel and unusual punishment is a sentence which is disproportionate to the offense,<sup>73</sup>

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69. “[P]ublic opinion poll[s] obviously [are] of some assistance in indicating public acceptance or rejection of a specific penalty.” *Furman*, 408 U.S. at 361 (Marshall, J., concurring). Justice Marshall stated that the utility of such polls depends on the citizenry being “informed as to the purposes of the penalty and its liabilities.” *Id.*

70. See text accompanying notes 129-72 *infra*. Even if some segments of the population are silent, it may be due to lack of exposure. As stated by Justice Marshall: Lack of exposure to the problem is likely to lead to indifference, and indifference and ignorance result in preservation of the status quo, whether or not that is desirable, or desired.

. . . It is therefore imperative for constitutional purposes to attempt to discern the probable opinion of an informed electorate.

*Furman*, 408 U.S. at 362 n.145 (Marshall, J., concurring). This “probable opinion” was not expected to be based on strictly rational precepts. “[A] violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens.” *Id.* at 362 (Marshall, J., concurring).

71. In *Aldoupolis*, discussed at text accompanying notes 1-14 *supra*, for example, 90% of the phone calls to Governor King were from women. *Los Angeles Times*, Nov. 27, 1981, at 22, col. 2. During the proceedings of a New York case involving the robbery of an elderly woman, senior citizens were organized into court watching groups, one function of which was to remind the judge that elderly people were routine targets for muggings in the Bronx. See text accompanying notes 164-70 *infra* for a discussion of this effort.

72. *Victim Witness Assistance Project, Victim Witness Legislation: Consideration for Policymakers*, 1981 A.B.A. SEC. CRIM. JUST. viii [hereinafter cited as *Victim/Witness*]. It is only recently that some state legislatures have decided to include victims in the statutory scheme by either mandating that victims be provided with information on the proceedings or that the impact on their lives be included in the presentence report. See text accompanying notes 229-34 *infra*.

73. “[The Clause] is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged,” *Furman*, 408 U.S. at 279-80 (quoting *O’Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)). This “disproportionality” test was later adopted by the Supreme Court in *Weems v. United States*, 217 U.S. 349, 367 (1910), where it was held that an excessive punishment, disproportionate to the crime committed, is cruel and unusual. Though the legislature has the primary responsibility for determining the proportionality relationship, it is subject to judicial review. “The limitations of proportionality are constitutional ones, and ‘what those are, the judiciary must decide.’” Note, *Excessively Long Sentence*, *supra* note 38, at 823-24 (quoting *Weems v. United States*, 217 U.S. 349, 379 (1910)). Generally, when a statute provides for a disproportionate punishment, the statute itself, and not the length of sentence can be attacked. *Id.* at 824. This principle adheres to the general rule against appellate review of statutory sentences. See note 38 *supra*. The Court of Appeals for the Sixth Circuit represents the minority position in holding that a statutory sentence of imprisonment

then community sentiment concerning the actual or potential experience of being "offended"<sup>74</sup> is highly relevant. A

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can be reviewed for a disproportionately excessive length of sentence. Note, *Excessively Long Sentence*, *supra* note 38, at 830 (citing *Downey v. Perini*, 518 F.2d 1288 (6th Cir.), *vacated on other grounds*, 432 U.S. 933 (1975); *Hemans v. United States*, 163 F.2d 228 (6th Cir.), *cert. denied*, 332 U.S. 801 (1947)).

The Fourth Circuit also has held that a statutory sentence of imprisonment was cruel and unusual because of its excessive length. The judgment was vacated and the case remanded for further consideration, however, in light of *Rummel v. Estelle*, 445 U.S. 263 (1980). *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979) (en banc), *vacated*, 445 U.S. 947 (1980).

In *Rummel*, the Supreme Court held that a mandatory life sentence imposed on the defendant pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment. The defendant had committed three felonies over a nine year period for fraudulently presenting a credit card to obtain \$80.00 worth of goods, passing a forged instrument for \$28.36 and obtaining \$120.75 by false pretense. The Court reached its holding "[b]y downplaying the applicability of the proportionality doctrine for assessing lengths of sentences, and giving the utmost respect to the principle of federalism." Gardner, *supra* note 25, at 1125. Thus, at least one commentator believes that while the *Rummel* Court "did not wholly reject the eighth amendment proportionality doctrine, [it] did severely restrict its applicability to cases challenging the length of sentences." *Id.* However, the Court may have curtailed the application of the proportionality doctrine to cases involving recidivist statutes only, thereby leaving "courts free to apply the eighth amendment . . . to excessive punishment of a single offense." *Id.* at 1128.

74. Judicial knowledge of community sentiment in regard to the seriousness of particular types of crimes, *see* ABA Statement Concerning Bail, Sentencing and Corrections, submitted to the Attorney General's Task Force on Violent Crime 5 (1981) ("we feel that sentencing guidelines should seek to reflect the current community consensus about the relative gravity of offenses"), need not lead to being swayed by public clamor. In an Illinois case, *People v. Short*, 66 Ill. App. 3d 172, 383 N.E.2d 723 (App. Ct. 1978), a state attorney questioned prominent members of the community and the victims during the sentencing hearing, as to whether they thought "that the granting of probation would deprecate the seriousness of the offense involved." *Id.* at 180, 383 N.E.2d at 730. The defendants, two high school seniors, were charged with burglary, arson and criminal damage to property. They broke into a week-end home, began "playing around" with matches and lighter fluid, causing extensive damage to the house in the resulting fire. *Id.* at 173, 383 N.E.2d at 725. In affirming the convictions and remanding for resentencing, *id.* at 181, 383 N.E.2d at 730, the appellate court held that this practice was improper because the trial court must ultimately decide this issue after hearing testimony regarding facts surrounding the offense and the characteristics of the defendants. *Id.* at 180, 383 N.E.2d at 730 (citing ABA STANDARDS, SENTENCING ALTERNATIVES AND PROCEDURES § 5.3 (1974) ("the prosecutor, no less than the judge, has the duty to resist public clamor or improper pressure of any sort")). The individuals who testified were the Chief Deputy Sheriff, the chief of the fire department and his assistant and the owners of the damaged house. The well-reasoned opinions of these individuals, all connected to the case, hardly seems to qualify as "public clamor." *See Short*, 66 Ill. App. 3d at 177-80, 383 N.E.2d at 727-29. Paradoxically, the trial judge had imposed a much harsher sentence than was advocated by some of the chief witnesses at the sentencing hearing. The trial judge had sentenced defendants to the maximum term allowable of one to three years and imposed a fine of \$1000 per defendant. *Id.* at 174, 383 N.E.2d at 725. The chief of the fire department had advocated a light sentence of 30

disproportionately lenient punishment may imply that the victim who is terrorized, beaten and robbed is not worthy of much concern.<sup>75</sup>

In a recent New York case,<sup>76</sup> the sentencing judge noted his awareness of public opinion<sup>77</sup> yet proceeded to deliberate with care before imposing sentence on the defendant.<sup>78</sup> The court held that to follow the mandatory sentencing statute would result in the imposition of a "cruel and unusual punishment."<sup>79</sup> In noting that one of the goals of punishment is "to make whole those who have suffered loss as a result of criminal activity,"<sup>80</sup> the court recognized the suffering of the victim and the public in regard to the crime of selling drugs. Nevertheless, in declining to follow the statute, the court stated that the New York drug laws were "Draconian"<sup>81</sup> as applied to this

days served on the weekends in the county jail and the assistant fire chief advocated a sentence of 60 days on weekends. *Id.* at 179, 383 N.E.2d at 728. The victims had advocated a "full sentence" and "full restitution." *Id.* at 179-80, 383 N.E.2d at 729. Given these facts, it can hardly be said that the judge was swept along by the pressure of public outcry.

75. See Von Hirsch, *supra* note 30, at 246 ("disproportionately lenient punishment for murder implies that human life—the victim's life—is not worthy of much concern. . .").

76. *People v. Vincent*, N.Y.L.J., July 12, 1982, at 19, col. 2 (Sup. Ct. Queens County June 25, 1982).

77. Justice Hentel of the Trial Term stated:

Today, many voices are raised demanding security and surcease from proliferating crime problems. Most solutions proposed are simplistic in nature—tougher judges, harsher laws, and Draconian penalties. . . . "Lock 'em up and throw away the key" is easy to shout these days based on fear and emotion rather than practicality, but not always easy to do in a particular case. . . . And all cases must be judged on their facts and merits.

A Society through its laws cannot be that cruel, or hardened or insensitive to the good possibilities which may exist for non-violent, one time criminals who are just as much the victims of their own crimes and illnesses as is society. To continue seeking "a pound of flesh" in retribution in every case will-nilly . . . [has] been proven by history to be senseless.

*Id.*, at 19, col. 5.

78. *Id.*, at 20, col. 1.

79. *Id.* The defendant, 22 years old, was charged with third degree Criminal Sale of a Controlled Substance (he sold four grains of heroin to an undercover police officer for \$30.00) pursuant to N.Y. PENAL LAW § 229.39 (McKinney 1980). Sentencing had been adjourned several times. During this period, defendant was enrolled in a drug treatment program and maintained a steady employment history. As a result, the defendant was granted probation provided he continued drug treatment, remained drug-free and maintained steady employment. The court reasoned that although the mandatory sentencing statute was not unconstitutional per se, mandatory sentencing in this case would be unduly harsh and would have no discernible benefit. Thus, this case represented the "rare case" where the following of a sentencing statute would result in a "cruel and unusual punishment." *Vincent*, N.Y.L.J., July 12, 1982, at 19, col. 6; 20, col. 1.

80. *Vincent*, N.Y.L.J., July 12, 1982, at 19, col. 5.

81. *Id.*



particular defendant.<sup>82</sup> This case illustrates that judicial awareness does not necessarily lead to subservience to public opinion. Rather, knowledge of what “shocks the conscience and sense of justice of the people”<sup>83</sup> is valuable in imposing a proportionate sentence, the concept of proportionality being central to any analysis of “cruel and unusual” punishment.<sup>84</sup>

### C. Equal Protection

Implicit in the “cruel and unusual” punishment theme is the guarantee of equal protection.<sup>85</sup> “A penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”<sup>86</sup> The “cruel and unusual punishment” clause “require[s] legislatures to write penal laws that are even-handed, non-selective and nonarbitrary and require[s] judges to see to it that general laws are not applied sparsely, selectively and spottily to unpopular groups.”<sup>87</sup>

Courts have held uniformly that equal protection principles are not necessarily violated by the imposition of a different sentence on two offenders, each convicted for the same offense.<sup>88</sup> Disparate sentencing may constitutionally result when the characteristics of each individual offender are completely evaluated and taken into account. Such

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82. *Id.*, at 19, col. 6; 20, col. 1. In arriving at the sentencing decision, the trial judge mentioned principles of law previously discussed at notes 33 & 73 *supra*: that the defendant is “worthy of having a sentence fashioned for him which will not only fit his crime, but also fit him as the individual to be sentenced,” *Vincent*, N.Y.L.J., July 12, 1982, at 19, col. 4, and whether a punishment is excessive is determined by whether it is “so severe as to be . . . disproportionate to the crime,” *id.*, col. 6. Excessiveness was also to be determined by whether the punishment “serve[d] no penal purpose more effectively than a less severe punishment.” *Id.*

83. See text accompanying note 63 *supra*.

84. *Bullington v. Missouri*, 451 U.S. 430, 450 n.3 (1981) (Powell, J., dissenting) (“a sentence may be called ‘erroneous’ if it is grossly disproportionate to the severity of the crime committed. But in that event, the sentence is ‘cruel and unusual’ in violation of the Eighth Amendment”).

Even given the most extreme point of view that the “*Rummel* Court paid lip service to the [eighth amendment] proportionality doctrine, [but] effectively abandoned it” for non-capital cases, see *Gardner*, *supra* note 25, at 1133; note 73 *supra*, federal courts may still be inclined to utilize it because they are not restrained by the concerns of federalism; state courts may limit the *Rummel* holding to recidivist offender statutes; and state courts are free to follow the doctrine under state constitutional prohibitions against cruel and unusual punishment. See *Gardner*, *supra* note 25, at 1137.

85. *Furman*, 408 U.S. at 249 (Douglas, J., concurring).

86. *Id.*

87. *Id.* at 256.

88. A. CAMPBELL, *supra* note 25, § 45, at 163.

characteristics include a defendant's prior record, personal characteristics and degree of culpability.<sup>89</sup> While these bases for disparity in sentences for defendants convicted of the same offense are valid, disparate sentences based on discriminatory factors such as race, sex or economic status, are not. Yet, "[t]he crazy quilt of disparities—the wide differences in treatment of defendants whose situations and crimes look similar and whose divergent sentences are unaccounted for—stirs doubts as to whether the guarantee of the 'equal protection of the laws' is being fulfilled."<sup>90</sup>

If the consideration of public sentiment causes further disparities in sentencing, then equal protection violations might be exacerbated.<sup>91</sup>

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89. See *State v. Lyman*, 26 Conn. Supp. 70, 73, 213 A.2d 73, 74 (Super. Ct. 1965); *People v. Corapi*, 42 Misc. 2d 247, 252, 247 N.Y.S.2d 609, 614 (App. Term 1st Dep't 1964); *McCleary v. State*, 49 Wis. 2d 263, 271, 182 N.W.2d 512, 517 (1971).

90. M. FRANKEL, *supra* note 38, at 103. The Supreme Court found that the death sentence, for example, was "disproportionately imposed and carried out on the poor, the Negro and the members of unpopular groups," *Furman*, 408 U.S. at 249-50 (Douglas, J., concurring) (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 143 (1967)), and that discriminatory application of any penalty would violate the equal protection theme implicit in the "cruel and unusual" punishment clause. *Id.* at 245 (Douglas, J., concurring). The Court also stated that it could not find any instances of execution of "any member of the affluent strata of this society." *Id.* at 251-52. For a discussion of sentencing of the "white-collar" criminal, see generally L. FORER, *supra* note 20, at 194-208 (white-collar crime); Pelaez, *Of Crime—And Punishment: Sentencing the White-Collar Criminal*, 18 DUQ. L. REV. 823 (1980). For data supporting the view that "white-collar offenders benefit from relatively lenient treatment," see Hagan & Nagel, *White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York*, 20 AM. CRIM. L. REV. 259, 278 (1982).

Although discrimination on the basis of sex was not found to violate the equal protection clause in the past where, for example, a longer prison term was imposed on a female than upon a male committing the same crime, *Ex rel. Gosselin*, 141 Me. 412, 44 A.2d 882, *appeal dismissed*, 328 U.S. 817 (1945), discrimination in sentencing on the basis of sex has been found to violate equal protection. See *State v. Chambers*, 63 N.J. 287, 307 A.2d 78 (1973) (statute requiring females to receive indeterminate sentencing where males would not violated equal protection principles); see also *Commonwealth v. Butler*, 458 Pa. 289, 328 A.2d 851 (1974) (statute proscribing minimum sentences only for female offenders violates both federal and state equal protection clauses); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968) (proscription of indeterminate sentencing for women held unreasonable and unrelated to any rational sentencing objective). Cf. *Wark v. State*, 266 A.2d 62 (Me.), *cert. denied*, 400 U.S. 952 (1970) (legislature could logically and reasonably conclude that a more severe penalty should be imposed upon a male prisoner escaping from the state prison than upon a woman confined at the reformatory).

91. This might occur, for example, if defendants were "sentenced according to the vacillations of the judge in response to the ever-changing popular feeling concerning crime," Burr, *supra* note 38, at 4 (quoting W. MORSE & R. BEATTIE, *SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN OREGON* 164 (1932)), and the "popular feeling" was based on racial discrimination.

The opposite hypothesis might be better founded, however, in that consideration of popular feeling in regard to the seriousness of particular offenses could serve to decrease sentence disparity in a given region.<sup>92</sup> In *Aldoupolis*,<sup>93</sup> for example, the trial judge considered as mitigating factors that the defendants were all first offenders and were from "very close, supportive families," when he suspended their three-to-five year prison sentences and placed them on probation.<sup>94</sup> In another recent Massachusetts case, three doctors were convicted of raping a nurse and were sentenced to three-to-five years in prison, with all but six months suspended.<sup>95</sup> The divergent sentences seem unaccounted for, especially as the facts of the *Aldoupolis* case involve even greater brutality and warrant a more serious punishment. Consideration of the community consensus on the relative gravity of the crime<sup>96</sup> of rape might have resulted in more rational and just sentencing determinations in these two cases.<sup>97</sup>

#### D. Double Jeopardy

A principal aim of the double jeopardy prohibition is to prevent the government, "with all its resources and power [from making] re-

92. Public sentiment regarding the relative gravity of offenses might counteract the disparity which results when "different judges give different sentences to different defendants" convicted of the same crime, because of the "real flaws: the discrepancies between judges, boroughs [and] races." N.Y. Times, Feb. 13, 1982, at 24, col. 3-4 (letter from Florynce Kennedy, Esq.).

Public consensus on a national level might help to eradicate disproportions in sentencing which occur on the state level as exemplified in *State v. Trowbridge*, 95 Idaho 640, 516 P.2d 362 (1973), wherein defendant was sentenced to a five-year term of imprisonment for stealing four calves in Idaho, and *Aldoupolis v. Commonwealth*, 386 Mass. 260, 435 N.E.2d 330 (1982), *cert. denied*, 51 U.S.L.W. 3257 (U.S. Oct. 5, 1982) (nos. 82-203 & 82-5159), wherein the three-to-five year prison terms imposed on defendants who raped, sodomized, assaulted, and destroyed the car of a woman in Massachusetts, were initially suspended.

93. 386 Mass. 260, 435 N.E.2d 330 (1982), *cert. denied*, 51 U.S.L.W. 3257 (U.S. Oct. 5, 1982) (nos. 82-203 & 82-5159), discussed at notes 1-14 *supra*.

94. *Commonwealth v. Tarr*, No. 76300-324, at 2-4 (Super. Ct. Oct. 9, 1981).

95. *Commonwealth v. Sherry*, 386 Mass. 682, 437 N.E.2d 224 (1982).

96. *See note 35 supra*.

97.

Public outcry, particularly by oppressed groups, [such as the poor, the elderly, minorities and women] can have a corrective influence on the criminal justice system. Power built the "road." Most public opinion will follow the "road." But when oppressed groups use it [i.e., express their opinions and sentiments], they can prevent justice from going too far off the "road." For example, consider the old nursery rhyme modified to reflect modern bigotry: "eeny, meany, miny, mo; catch a nigger by the toe; if he hollers, let him go." We didn't holler loud enough.

Interview with Florynce Kennedy, Esq., in New York City (August 2, 1982) (attorney, lecturer, coordinator: Black Women United For Political Action).

peated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ."<sup>98</sup> Does the double jeopardy protection apply to sentencing?

In *Bullington v. Missouri*,<sup>99</sup> the Supreme Court applied the double jeopardy prohibition to sentencing.<sup>100</sup> The Court held that the state was precluded from seeking the death penalty at defendant's retrial because the jury had effectively "acquitted" the defendant of imposition of any harsher sentence<sup>101</sup> when it fixed his punishment at life imprisonment after a presentence hearing.<sup>102</sup> The Court based its application of the double jeopardy prohibition to sentencing, however, on the specific statutory procedures employed by the Supreme Court of Missouri.<sup>103</sup> The Court determined that the state had already had "one fair opportunity to offer whatever proof it could assemble," and was "not entitled to another."<sup>104</sup>

In the case where a sentencing judge's discretion is essentially unfettered, would a judge's consideration of public opinion after a sentence has been imposed lead to a violation of the double jeopardy prohibition? In *Sonnier v. State*,<sup>105</sup> the Supreme Court of Alaska held that a trial judge violated the prohibition when he increased a sentence pronounced only a few hours earlier, solely because the victim's husband complained that the original sentence was too lenient.<sup>106</sup> Even

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98. *Green v. United States*, 355 U.S. 184, 187 (1957).

99. 451 U.S. 430 (1981) (defendant convicted of capital murder).

100. *Id.* at 446.

101. *Id.*

102. *Id.* at 445.

103. Missouri law provides only two possible sentences for a defendant convicted of capital murder: death or life imprisonment. *Id.* at 432 (citing Mo. REV. STAT. § 565.008.1 (1978)). A presentence hearing is held before the same jury that found the defendant guilty. Evidence in extenuation, mitigation and aggravation is heard. The jury's decision must be unanimous for the death penalty to be imposed; otherwise life imprisonment is imposed. *Id.* at 433-35.

104. *Id.* at 446 (quoting *Burks v. United States*, 437 U.S. 1, 16 (1977)). The presentence hearing in *Bullington* resembled a trial on the issue of guilt or innocence. *Id.* at 438-39. In making the sentencing determination, the jury had to utilize "the reasonable—doubt standard of the Missouri statute." *Id.* at 441. The jury, by statute, had only two alternatives, whereas in most cases, the sentencing judge's discretion is essentially unfettered. *Id.* at 439. Thus, in the usual case, it is impossible to conclude that a sentence less than the statutory maximum represents a determination that the government has failed to prove its case. *Id.* at 443.

105. 483 P.2d 1003 (Alaska 1971) (defendant pleaded guilty to robbery and assault with intent to kill).

106. *Id.* at 1004. In *Sonnier*, the trial judge had been sufficiently impressed with the complaint of the victim's husband to the effect that the sentence was too lenient, that he risked increasing the sentence. *Id.* The original sentence imposed was five

though the increased sentence was still within statutory limits, the Supreme Court of Alaska held that once a sentence is meaningfully imposed, it may not be increased at a later time.<sup>107</sup> The court stated that "one of the great purposes of the double jeopardy clause is to prevent popular pressures from operating to the detriment of the accused after he has once been sentenced."<sup>108</sup>

In *Aldoupolis*, by contrast, the trial judge relied on a Massachusetts statute in revoking the suspension of the sentences.<sup>109</sup> The Supreme Judicial Court of Massachusetts held that the judge had authority to revise the sentences and that such action did not violate double jeopardy principles.<sup>110</sup> Consequently, the court held that "[t]he defendants should not have had an expectation of finality in their sentences in the face of this rule."<sup>111</sup>

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years on each count to run concurrently with eligibility for parole at the parole board's discretion. The sentence subsequently imposed was 10 years on each count to run concurrently with the possibility of parole after three years and four months. *Id.* at 1003-04. The judge stated that he had made a mistake at the first sentencing, was relying on "certain plenary power" to correct his mistake and that although defendant might have grounds for an appeal, he "was not going to alter [his] action." *Id.* at 1004.

107. *Id.* at 1005.

108. *Id.*

109. MASS. ANN. LAWS, R. CRIM. P. 29 (Law. Co-op. 1979) provides that "[t]he trial judge upon his own motion or the written motion of a defendant filed within sixty days after the imposition of a sentence . . . may, upon such terms and conditions as he shall order, revise or revoke such sentence if it appears that justice may not have been done." Public opinion was not named as the reason for the trial judge's revocation of the suspension of sentence either by the trial judge or by the Supreme Judicial Court of Massachusetts, *see* note 10 *supra* and accompanying text, though defense counsel argued that the judge had succumbed to public and political pressure. *See* text accompanying note 11 *supra*.

110. *Aldoupolis*, 386 Mass. at 268, 435 N.E.2d at 334. The Supreme Judicial Court of Massachusetts relied on *United States v. DiFrancesco*, 449 U.S. 117 (1980), in holding that the double jeopardy prohibition against multiple punishment was not violated. The Massachusetts court determined that the defendants were not cumulatively sentenced to a greater term than proscribed by the legislature and that defendant's commencement of probation also did not violate double jeopardy. *Aldoupolis*, 386 Mass. at 273-74, 435 N.E.2d at 337.

111. *Aldoupolis*, 386 Mass. at 274, 435 N.E.2d at 338. Double jeopardy is also not at issue where criticism by the public or press of a judge's proposed sentence is instrumental to a change in the sentence ultimately imposed. In a New York case, *People v. Wright*, 104 Misc.2d 911, 429 N.Y.S.2d 993, (Sup. Ct. N.Y. County 1980), a judge's proposed sentence was criticized by the press before the final sentencing determination was made. *Id.* at 913, 429 N.Y.S.2d at 996. The court rejected defendant's contention that the government had "exerted unethical pressure on the court by exposing defendant's case and background to the news media," *id.* at 914, 429 N.Y.S.2d at 996, which allegedly persuaded the sentencing judge to reconsider a promise made to defendant during plea bargaining. The court found that the new information unearthed during the sentencing hearing amply justified the sentencing judge's change of position. *Id.* at 915, 429 N.Y.S.2d at 997. The *Wright* court also

*Sonnier* and *Aldoupolis* indicate that the issue of whether the constitutional prohibition against double jeopardy is violated when a judge increases a criminal sentence after exposure to extrajudicial pressure depends on the circumstances and the applicable state law.

### E. Abuse of Discretion

The wide discretion exercised by judges in imposing sentences dates back to English Common Law.<sup>112</sup> As one circuit court has stated, absent a showing of arbitrary or capricious action amounting to a gross abuse of discretion,<sup>113</sup> "a federal district judge has wide discre-

recognized the educative value of the expression of public sentiment concerning a particular case, in that the court stated: "no 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." *Id.* (citation omitted).

112.

[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law . . . . A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant . . . .

*Williams v. New York*, 337 U.S. 241, 246 (1949). The "abuse of discretion" doctrine has been chiefly developed by case law though some of its tenets have been codified, as for example, in the A.B.A. Code of Judicial Conduct, adopted by many states. AMERICAN JUDICATURE SOCIETY, HANDBOOK FOR JUDGES 3 (1961). See, e.g., N.Y. CODE JUDIC. COND., reprinted in N.Y. JUD. LAW. app. at 517 (McKinney 1975).

113. "Abuse of discretion" is a broad term which encompasses many meanings. For instance, failure to exercise discretion was found where a sentence was imposed on a "mechanical basis." *Woosley v. United States*, 478 F.2d 139, 143 (8th Cir. 1973). The defendant, a 19-year old member of Jehovah's Witnesses, was a conscientious objector who refused to seek that classification or to report for induction into the United States armed forces. He was convicted of failing to report for induction and was given a five-year prison sentence. *Id.* at 140. The Eighth Circuit found that the trial judge sentenced in a mechanical fashion because he gave all defendants convicted of refusing induction a five-year term, *id.* at 143, in disregard of the policy of "individualizing sentences." *Id.* at 144 (quoting *Williams v. New York*, 337 U.S. at 248). The court held that imposing the maximum sentence on this particular defendant was a gross abuse of discretion which "shock[ed] the judicial conscience." *Id.* at 147. See also *United States v. Wardlaw*, 576 F.2d 932, 937-38 (1st Cir. 1978) (abuse of discretion found where defendants sentenced in mechanistic fashion which failed to individualize sentences).

Another definition of "abuse of discretion" is arbitrary or unreasonable judicial action: "where no reasonable man would take the view adopted by the trial court." *Woosley*, 478 F.2d at 150 (quoting *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942)).

tion in determining what sentence to impose and such a sentence will not be questioned on appeal so long as the sentence is within the statutory limits . . . .”<sup>114</sup> Thus, while a judge’s discretion in sentencing is broad, such discretion must be exercised soundly.<sup>115</sup> Sound discretion has been described as being “free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just.”<sup>116</sup>

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The Supreme Court of Wisconsin has held that a “sentence is the product of an abuse of discretion [when there is] no delineation of any of the factors utilized by the trial judge in the exercise of discretion.” *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512, 522 (1971) (abuse of discretion found in the imposition of indeterminate sentence of up to nine years without any explanation, on first offender convicted of forging a check). The statement of reasons for sentencing on the record facilitates the trial judge’s rationale and aids in appellate review. *Id.* at 282, 182 N.W.2d at 522. *See also State v. Cooper*, 87 Wis. 2d 915, 274 N.W.2d 905 (1979) (unpublished limited precedent opinion, available on LEXIS, States library, WI file) (abuse of discretion found where defendant was sentenced to 30 years for attempted murder and 10 years for armed robbery, to run consecutively, without stating reasons on record; sentence not set aside for that reason alone, however, and court held sentence not excessive and affirmed). The holding that a judge must state reasons for a particular sentence is unusual, however, and it is not required on the federal level. Frankel, *supra* note 24, at 9. *See also United States v. Garcia*, 617 F.2d 1176, 1178 (5th Cir. 1980) (“The fact that the trial judge did not announce reasons for the severity of the sentence [15 years imprisonment followed by special parole term of 20 years for conspiracy to possess with intent to distribute cocaine, in violation of federal statutes] does not constitute an abuse of discretion.”). The Second Circuit has stated that “a statement of reasons by the sentencing judge would be a most salutary practice,” although not formally required. *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973).

Other examples of abuse of discretion are illustrated by *United States v. Small*, 636 F.2d 126 (5th Cir. 1981) (arbitrary or capricious abuse of discretion not found where defendant, convicted of conspiracy to distribute cocaine, was given 10-year sentence based on information received on day before sentencing that he was arrested on independent charge for importation of marijuana); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976) (abuse of discretion found where trial court failed to consider defendant’s objections at sentencing to allegations raised by court, government and state prosecutors); *People v. Short*, 66 Ill. App. 3d 172, 383 N.E.2d 723 (App. Ct. 1978) (abuse of discretion found where trial court may have improperly conditioned imposition of probation on defendants’ ability to pay restitution).

114. *United States v. Hayes*, 589 F.2d 811, 826 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979).

115. Exercise of sound discretion “encompasses consideration of all relevant factors such as the nature of the offense, the history and background of the defendant, and of course the interest and concerns of society, to mention only a few.” *Woosley v. United States*, 478 F.2d 139, 148 (8th Cir. 1973) (Matthes, C.J., concurring).

116. *People v. Beasley*, 5 Cal. App. 3d 617, 630, 85 Cal. Rptr. 501, 509 (Ct. App. 1970) (abuse of discretion found where judge had decided question of probation long before he was in possession of relevant facts of probation report). *See text accompanying notes 224-28 infra* for further discussion of this case.

If a judge considers community sentiment, will an abuse of discretion be found by an appellate court? In *State v. Trowbridge*,<sup>117</sup> the defendant had pleaded guilty to grand larceny and was sentenced to a five-year prison term.<sup>118</sup> The defendant argued on appeal that the trial judge had been unduly influenced by a presentence report which noted the existence of strong community feelings in opposition to granting probation.<sup>119</sup> The Supreme Court of Idaho determined that if the sentence was within statutory limits and the decision was based upon reason, not emotion, an abuse of discretion ordinarily would not be found.<sup>120</sup> The court held that the trial judge "was [not] swayed from a thoughtful and conscientious decision by community sentiment."<sup>121</sup> Therefore, no abuse of discretion was found and the judgment was affirmed.<sup>122</sup>

Although community sentiment was considered by the *Trowbridge* court, his sentencing decision was found to be impartial because he had carefully considered the characteristics of the defendant and the circumstances surrounding the offense.<sup>123</sup> While *Trowbridge* illustrates the potential contribution which increased judicial awareness of community experience and sentiment may make to rational and just sentencing determinations, it also highlights the potential danger of a judge being unduly swayed by a powerful economic group.<sup>124</sup> In

117. 95 Idaho 640, 516 P.2d 362 (1973).

118. *Id.* at 640, 516 P.2d at 362 (defendant stole four calves entrusted to his care as part of his employment as range rider).

119. *See id.* at 641, 516 P.2d at 363. While there was no personal animosity towards him, the community wished to set an example. *Id.*

120. *Id.* The court based its holding on the fact that the trial court had considered all the factors appropriate to sentencing. The trial court considered all the circumstances surrounding the offense, the fact that the defendant was a first offender, his previous actions and character, whether he could be rehabilitated, whether he would comply with the terms of probation, if granted, and the interests of society in being protected from future criminal conduct of defendant. *Id.*

121. *Id.* at 642, 516 P.2d at 364.

122. *Id.*

123. *See* note 120 *supra*.

124.

No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process.

*Pennekamp v. Florida*, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring).

For a brief discussion of the possibility that the *Trowbridge* and *Aldoupolis* judges were politically motivated, see note 207 *infra*. Ironically, the *Trowbridge* defendant was sentenced to a term of imprisonment for a nonviolent crime, whereas the *Aldoupolis* defendants' prison sentences for a violent crime were initially suspended. *See* text accompanying note 5 *infra*. Community standards were taken into account



considering public sentiment in the sentencing decision, the line between sound judicial discretion and abuse of discretion may, at times, be a fine one.

### III. Sources of Pressure on a Sentencing Judge: Public, Press & Political

Public opinion and sentiment may be reflected in the general theories of punishment relied upon by a sentencing judge, such as retribution, community condemnation, rehabilitation, deterrence, or incapacitation.<sup>125</sup> The opinions of certain sectors of the public are apparent in the organized activities of citizens groups<sup>126</sup> and in the testimony, letters, petitions, and written recommendations of particular members of the public which are often directed to sentencing judges.<sup>127</sup> Opinions expressed by the press and by political figures in regard to particular sentencing decisions represent other potential pressures on a sentencing judge.<sup>128</sup>

#### A. Community Condemnation as Public Pressure

The expression of community condemnation is considered by some legal scholars to be an essential ingredient,<sup>129</sup> if not the chief aim, of punishment.<sup>130</sup> Punishment has been said to be the "conventional

during the initial sentencing proceedings in *Trowbridge* and may have led to the harsh sentence. Lack of community consideration in *Aldoupolis*, on the other hand, may have contributed to the excessive leniency of the original sentencing decision.

125. See M. FRANKEL, *supra* note 38, at 106. See also *United States v. Bergman*, 416 F. Supp. 496, 498-500 (S.D.N.Y. 1976); see generally A. CAMPBELL, *supra* note 25, §§ 4-8 (1978 & Supp. 1981).

126. See text accompanying notes 162-72 *infra*.

127. See text accompanying notes 145-52 *infra*.

128. See text accompanying notes 173-220 *infra*.

129. Feinberg, *The Expressive Function of Punishment*, in SENTENCING 23-24 (H. Gross & A. Von Hirsch eds. 1981). See also *United States v. Mattox*, 417 F. Supp. 343, 345 (S.D.N.Y. 1976) ("Punishment serves more or less the ends of retribution and denunciation—making the defendant 'pay' and reaffirming the community's outrage against the behavior in question.").

In New York, there is a long line of cases embracing the notion that a penal sentence should "encompass the community's condemnation of the defendant's misconduct." *People v. Silver*, 10 A.D.2d 274, 276, 199 N.Y.S.2d 254, 256 (1st Dep't 1960). See *People v. Golden*, 41 A.D.2d 242, 342 N.Y.S.2d 309 (1st Dep't 1973); *People v. Hardy*, 34 A.D.2d 843, 310 N.Y.S.2d 357 (3d Dep't 1970); *People v. Cotter*, 25 A.D.2d 609, 267 N.Y.S.2d 679 (4th Dep't 1966); *People v. Burghardt*, 17 A.D.2d 912, 233 N.Y.S.2d 60 (4th Dep't 1962).

130. Public sentiment may take the form of "community denunciation," a chief aim of sentencing. Frankel, *supra* note 24, at 10; Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-05, 436-37 (1958). While "community condemnation" is expressed in "the legislature's prior grading and characterization,

device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted."<sup>131</sup> Expressions of denunciation or condemnation by the community are generally reflective of the community's attitude concerning the gravity of the offense.<sup>132</sup> Although legislatures make the initial "judgments of seriousness" in setting the maximum penalties and in scaling minimum penalties according to their sense of the gravity of the offenses involved, "these statutory limits are . . . seldom decisive in actual sentencing decisions" because of judicial discretion in indeterminate sentencing.<sup>133</sup>

Judge Learned Hand has noted the difficulty in determining the types of conduct which "outrage" the moral feelings of most people, without some sort of "national inquisition, like a Gallup Poll."<sup>134</sup> A recent study, however, has shown that this difficulty can be overcome, and has found a substantial degree of consensus as to the degree of seriousness of various crimes "among blacks and whites, males and females, high and low socioeconomic levels, and among [differing]

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in general terms," it is also expressed in the particular sentence imposed pursuant to judicial discretion. *Id.* at 437-38.

Many commentators today favor a theory of commensurate or just deserts: that the severity of the punishment ought to comport with the gravity of the offense. See generally R. SINGER, *supra* note 34, at 28; Gross, *Proportional Punishment and Justifiable Sentences*, in SENTENCING 272-83 (H. Gross & A. Von Hirsch eds. 1981); Von Hirsch, *supra* note 30, at 243-55; Feinberg, *supra* note 129, at 24.

131. Feinberg, *supra* note 129, at 24. In essence, the judge is "commissioned to speak" for the community in ultimately determining the sentence. *United States v. Paterno*, 375 F. Supp. 647, 647 (S.D.N.Y.), *aff'd mem.*, 498 F.2d 1396 (1974), *cert. denied*, 419 U.S. 1106 (1975).

132. One of the subjective factors to which a sentencing court must pay heed is "[it's] perception of the community's condemnation of the misconduct." Hopkins, *supra* note 38, at 492-93.

133. Von Hirsch, *supra* note 30, at 248. Therefore, the question of whether a judge should rely strictly on his or her own judgment regarding the seriousness of the offense or include in the consideration the additional factor of actual community sentiment regarding seriousness, becomes pertinent. Most judges are white males from middle and upper-class economic strata. See J. RYAN, A. ASHMAN, B. SALES & S. SHANE-DUBOW, *AMERICAN TRIAL JUDGES* 128-30, 141 (1980) (women and ethnic minorities are underrepresented in the judiciary). Therefore, any educative process that would aid in dispelling unexplored and unadmitted personal biases would also increase public trust in the judiciary, in which so much discretion is currently invested. M. FRANKEL, *supra* note 38, at 17-24; W. GAYLIN, *PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING* 28-43 (1974); see also L. FORER, *supra* note 20, at 202 ("Middle-aged and middle-class judges . . . are understandably reluctant to send people like themselves to prisons where they know what is likely to happen to them.").

134. *Repouille v. United States*, 165 F.2d 152, 153 (2d Cir. 1947) (naturalization proceeding in which determination of "good moral character" necessary).

levels of educational attainment.”<sup>135</sup> This study suggests that “[w]hatsoever the complexities in the concept of seriousness [are] . . . people from widely different walks of life can make common-sense judgments on the comparative gravity of offenses and come to fairly similar conclusions.”<sup>136</sup>

It has been shown statistically that the elderly are the most fearful of inherent dangers in their everyday environments. The groups most affected by fear of specific violent crimes are blacks, women, the young, and people living in cities.<sup>137</sup> The poor may be particularly concerned with “lack of lawfulness and objectivity in the administration of criminal justice.”<sup>138</sup> Thus, community condemnation arises from many different quarters of the community, all of which should be considered in any attempt to gauge the pulse of the community as to the seriousness of an offense.

## B. Examples of Public/Community Pressure

A district court judge once stated that in determining a just sentence, “[w]e are not permitted . . . to overlook that the community for which the judge is commissioned to speak ultimately decides and demands and is owed justice too.”<sup>139</sup> When faced with concrete com-

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135. Rossi, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974), quoted in Von Hirsch, *supra* note 30, at 248. In the 1960's, prior to the Rossi study, a pioneering study was performed by sociologists Thorsten Sellin and Marvin Wolfgang at the University of Pennsylvania. They asked a group of judges, college students and policemen to rate the “seriousness” of various offenses on an eleven-point scale. Considerable agreement was indicated by the data. Von Hirsch, *supra* note 30, at 248. Subsequent criticism of these findings on the ground that the sample group was unrepresentative prompted the Rossi study. Rossi's sample included individuals from different racial, occupational and educational subgroups. They were asked to rate 140 different offenses as to “seriousness,” on a scale of one to nine. Rossi, *supra*, at 248.

136. Von Hirsch, *supra* note 30, at 248.

137. See FIGGIE REPORT, *supra* note 20, at 20. Poor people and old people, among others, are particularly affected by fear of inherent dangers. *Id.* at 20, 51-52. Fear of specific crimes is partly due to the high rate of victimization experienced by a group, such as high murder rates among blacks and high rape rates among women. *Id.* at 36-37.

138. Nagel, *The Poor, Too, Want Law and Order*, in GOVERNMENT LAWLESSNESS IN AMERICA 240 (1971). “It is particularly unfortunate to imply that law and order is a goal of the middle class and an anti-goal of the poor. The truth of the matter seems to be that the poor, too, want law and order . . . .” *Id.* at 238. As one trial judge observed, “[t]here is no question that street criminals are more likely to be sentenced to prison than white-collar criminals and that they will serve longer sentences.” L. FORER, *supra* note 20, at 200. The fact that “[t]he media, the American Bar Association, and many concerned citizens are demanding that white-collar criminals be ‘punished’ ” is a form of community condemnation. *Id.* at 197-98.

139. *United States v. Paterno*, 375 F. Supp. 647, 647 (S.D.N.Y.), *aff'd mem.*, 498 F.2d 1396 (1974), *cert. denied*, 419 U.S. 1106 (1975). The defendants were found

munity pressure, however, a court may deem it to be an inappropriate factor for consideration. Nevertheless, the holding of the case often speaks to the contrary. In a Wisconsin case<sup>140</sup> involving prison escapees, one of the chief issues was whether a notation by the court clerk containing a reference to "local pressure to impose a lengthy sentence" indicated that the sentences were "tainted."<sup>141</sup> The Court of Appeals of Wisconsin stated that while "a judge must not be influenced by public or community pressure" in reaching an appropriate sentencing decision, the notation did not indicate that the sentencing was improperly enhanced.<sup>142</sup> Although the court maintained that it was inappropriate for the public to put "heat on the judiciary," deterrence was recognized as an appropriate factor to be considered in sentencing in order to protect citizens from potential prison escapees.<sup>143</sup> Thus, while both trial and appellate courts denied that community sentiment was influential, the additional prison terms ultimately imposed and upheld had been urged by the public.<sup>144</sup>

In a New York case, non-party community leaders who merely expressed an interest in the trial were permitted to testify in the prosecution of New York City landlords who had violated city housing

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guilty of tax fraud and were sentenced to nine months in prison, and fined \$20,000 and \$10,000, respectively. A defendant corporation was also fined \$25,000. *Id.* at 649-50. One of the factors the court considered, though purely in a theoretical manner, was: "[h]ow frightening to the community is the particular crime?" *Id.* at 649. Just because fear is not inspired does not mean that white-collar defendants should not be punished; "[e]ven though white-collar crime is nonviolent, surely the taking by deceit of a million dollars deserves as much, if not more of a penalty than a burglary or robbery of eleven dollars." L. FORER, *supra* note 20, at 202. For a discussion of the debate concerning whether white-collar criminals should be imprisoned or fined, *see id.* at 200-08.

140. *Weinfurter v. State*, No. 79-314-CR (Wis. 1979) (unpublished limited precedent opinion available on LEXIS, States library, WI file) (defendants, prison escapees, were sentenced to four-year terms to run consecutively to the sentences they were serving).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* In a West Virginia case, *State v. Wotring*, 279 S.E.2d 182 (W. Va. 1981), a defendant was convicted of possession of marijuana with intent to deliver, sentenced to one-to-five years in the West Virginia State Prison for Women and fined \$15,000. In affirming the trial court's decision, the Supreme Court of Appeals of West Virginia briefly noted that "we are troubled by the severity of the sentence" in that defendant was a widow supporting three children, had no prior criminal history and her crime was non-violent. Moreover, the court held that "[t]he record reflects that the trial court was aware of, and may have acceded to, intense community pressure surrounding this case. Be that as it may, we are unwilling to find error in the appellant's sentencing." *Id.* at 192.

and sanitary laws.<sup>145</sup> The Appellate Division of the Supreme Court noted that this was a "distressing circumstance" but affirmed the sentences because they were "well merited."<sup>146</sup>

Community pressure does not always take the form of condemnation. In *United States v. Bergman*,<sup>147</sup> United States District Court Judge Marvin Frankel received "scores of letters" praising the defendant.<sup>148</sup> The court also received a petition in which the signers denounced the defendant and urged a stiff sentence. The court summarily disregarded the petition because the opinions of the signers were based on reading the newspaper; they had no real connection with the defendant or the case.<sup>149</sup> In a New York case, a trial court followed the recommendations of approximately 100 persons in the community, including psychiatrists, educators and community leaders, in placing a defendant convicted of sodomy on probation.<sup>150</sup> The appellate court upheld the trial court's determination, attaching great significance to the fact that the group included the parents of the victim.<sup>151</sup> Thus, rather than condemning the defendant's misconduct, the community

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145. *People v. Zelkowitz*, 8 A.D.2d 161, 162, 186 N.Y.S.2d 848, 850 (1st Dep't 1959), *aff'd mem.*, 8 N.Y.2d 754 (1960).

146. *Id.* at 163, 186 N.Y.S.2d at 851. One defendant was sentenced to 30 days imprisonment and fined \$1,050. The other was fined \$500. *Id.* at 162-63, 186 N.Y.S.2d at 850. While stating that every defendant and the public at large "is entitled . . . to have the appearance of judicial impartiality, untrammelled by passion, pressure and prejudice," the court recognized that the unscrupulousness of some landlords and the poor housing conditions which resulted required stringent administrative measures and judicial support for those measures. *Id.* at 162, 186 N.Y.S.2d at 850-51. Thus, the urging by the community leaders that it was necessary to make an example of these defendants, though disapproved of by the court, *id.*, 186 N.Y.S.2d at 850, may actually have reinforced its recognition of the impact on the public of defendants' misconduct. Such a "reminder" may have aided the court in arriving at a just sentence. *Contra* *People v. Rednour*, 24 Ill. App. 3d 1072, 1076, 322 N.E.2d 492, 496 (App. Ct. 1975). The Appellate Court of Illinois affirmed defendant's conviction but remanded for resentencing because of trial court's failure to notify defendant of his right to counsel at sentencing. The court also noted that "the trial court improperly considered the public's displeasure with the number of recent burglaries, none of which were connected to the defendant and the public clamor for stricter sentences." *Id.* at 1077, 322 N.E.2d at 496.

147. *United States v. Bergman*, 416 F. Supp. 496 (S.D.N.Y. 1976) (defendant guilty of participation in a scheme to defraud the United States by making fraudulent claims for Medicaid funds and sentenced to four months imprisonment).

148. *Id.* at 498.

149. *Id.*

150. *People v. Mosher*, 24 A.D.2d 47, 49, 263 N.Y.S.2d 765, 767 (4th Dep't 1965) (sentence of defendant convicted of sodomy suspended and defendant placed on probation on condition of his attendance in therapy and employment in a field removed from young people).

151. *Id.* N.Y. PENAL LAW § 1.05(5) now provides for "consideration of the consequences of the offense for the victim, including the victim's family and the community." *Id.* (McKinney Supp. 1982-1983).

specifically requested that the defendant be given a chance for treatment and not be incarcerated.<sup>152</sup>

The danger of judicial rejection of community sentiment is illustrated in a 1982 New York case, *People v. Jagnjic*.<sup>153</sup> The defendant, a forty-three year old man, was convicted of aggravated sexual abuse, assault in the first degree and endangering the welfare of a child, his ten-year-old niece.<sup>154</sup> Despite the fact that the crime was "deliberate and premeditated,"<sup>155</sup> the appellate court vacated the sentence and remanded for resentencing pending a psychiatric evaluation.<sup>156</sup> The majority gave little weight to the "undoubted" traumatic effect<sup>157</sup> upon the victim and no consideration was given to the deterrence of such crimes. A concurring judge stated that if the purpose of the "extremely harsh sentence" was "to manifest society's horror at what occurred, it is a sufficient answer that defendant was no less horrified by what he had done."<sup>158</sup> The dissent appropriately pointed out that "[w]e do not know that this horrible act was 'as offensive to [defendant's] moral principles as to those of society as a whole.' Expressions of remorse or horror . . . may be sincere or insincere . . ."<sup>159</sup> What is clear is that "[t]he condemnation of crimes against the young is deeply

152. *Mosher*, 24 A.D.2d at 49, 263 N.Y.S.2d at 767.

153. 85 A.D.2d 135, 447 N.Y.S.2d 439 (1st Dep't 1982).

154. "[T]he victim's condition required an operation and a hospital stay of five to six days. . . . [Defendant] inserted the rubber penis strapped to his body into his 10-year-old niece's vagina for several minutes which act resulted in hemorrhaging. . . ." *Id.* at 140, 447 N.Y.S.2d at 442. (Lupiano, J., dissenting). The defendant was sentenced to concurrent 5-to-15 and 2-to-6 year terms of imprisonment. *Id.* at 136, 447 N.Y.S.2d at 440.

155. *Id.* at 141, 447 N.Y.S.2d at 442 (Lupiano, J., dissenting); see *id.* at 136, 447 N.Y.S.2d at 440 (Sandler, J., concurring) (defendant picked up niece from school, drove to beach, abused and assaulted her then tried to stem bleeding with pads previously purchased).

156. *Id.* at 136, 447 N.Y.S.2d at 439-40. This decision was reached despite the fact that "the defendant [did] not contend that he was ever insane or incompetent. . . . The defendant . . . had the opportunity to raise these matters at plea and sentence. He did not do so, and thus this Court should not consider those matters upon this appeal." *Id.* at 138-39, 447 N.Y.S.2d at 441 (Murphy, P.J., dissenting). The majority stated that "[i]f the approach is simply punishment or deterrence then the sentence . . . should not be disturbed." *Id.* at 135, 447 N.Y.S.2d at 439. The majority concluded, however, that "prison will obviously not have any effect with respect to rehabilitation nor does it help his family nor the victim." *Id.* at 136, 447 N.Y.S.2d at 439.

157. *Id.* at 135, 447 N.Y.S.2d at 439.

158. *Id.* at 137, 447 N.Y.S.2d at 440. (Sandler, J., concurring). The concurring opinion emphasized that "[e]xcept for this single event," *id.*, which was described by the majority as "aberrational," *id.* at 135, 447 N.Y.S.2d at 439, "the defendant would appear to be a worthwhile, honest, industrious human being." *Id.* at 137, 447 N.Y.S.2d at 440.

159. *Id.* at 142, 447 N.Y.S.2d at 443.

ingrained in the ethical and moral history of western civilization.”<sup>160</sup> Had the court considered carefully the societal condemnation, doubt might have been raised as to the “sufficiency” of defendant’s “answer.”<sup>161</sup>

### C. Organized Public Pressure—Court Observer Groups

The court observer movement is burgeoning in the United States.<sup>162</sup> Besides ordinary monitoring and data-taking functions,<sup>163</sup> some court observer groups have specifically set themselves the task of flooding the courts during particular proceedings to remind judges that they represent the past and potential victims of the specific type of crime involved.

One court observer group, “Attack on Crime Against the Elderly” (ACAE), was formed after the arrest of a suspect for the “push-in robbery”<sup>164</sup> of an eighty-two-year old woman.<sup>165</sup> A lawyer and a social worker employed at neighboring senior citizen centers used the energy generated by the outrage of the local senior citizenry to launch ACAE.<sup>166</sup> They organized senior volunteers to monitor the courts, assist victims of crime and speak out in lectures and interviews with the media on the subject of crime directed against the elderly.<sup>167</sup> Approximately fifty people were trained as court monitors to attend all phases of the criminal proceedings. The monitors were taught that their function was not to interfere with the defendant’s right to a fair trial, but only to be “visible” in the courtroom.<sup>168</sup>

160. *Id.*

161. *Id.* at 137, 447 N.Y.S.2d at 440 (Sandler, J., concurring).

162. See P. NEJELSKI, THE TENSION OF POPULAR PARTICIPATION 6-7 (Nat’l Center for State Courts, Research Essay Series No. E004, 1977); Stecich, *A Survey of Court Observer Programs*, 58 JUDICATURE 470 (1975).

163. Stecich, *supra* note 162, at 471, 473.

164. A “push-in robbery” describes the situation where the assailants push the victim into his or her apartment while the victim is unlocking the door before proceeding with the robbery. Interview with directors of project “Attack on Crime Against the Elderly,” under auspices of East Bronx Council on Aging, Parkchester, Bronx, New York in New York City (July 20, 1982) (directors are an attorney and a social worker) [hereinafter cited as Interview]. The description of the accused as the “godfather of crime against the elderly” was coined by Bronx police officers who said that he was the leader of a ring of muggers who “specialized” in robbing old people. *Id.*

165. Interview, *supra* note 164.

166. *Id.*

167. *Id.*

168. *Id.* The sixth amendment provides that: “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . .” U.S. CONST. amend. VI. The Supreme Court stated that “[t]here is no question that the Sixth Amendment permits and even presumes open trials as a norm.” Gannett

Monitors were present at the trial and sentencing of the robbery suspect who received the maximum possible term of imprisonment.<sup>169</sup> The directors of the project expressed the view that the sentence was rare in its severity and was a direct outcome of the presence of the court monitors and the intensity of organized citizen outrage concerning routine victimization of the elderly.<sup>170</sup>

Aside from court observer groups with specifically defined purposes, there are many "concerned citizens projects" with more loosely defined goals, such as proposing and pressing for judicial reform legislation, educating citizens regarding the court system and perhaps

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Co. v. DePasquale, 443 U.S. 368, 385 (1979). Members of the public have no constitutional right to attend criminal trials, however; the right to a public trial is conferred upon the accused. *Id.* at 379-80. The public's "right of access" is limited, in part, by the defendant's constitutional right to a fair trial. *Id.* at 398 (Powell, J., concurring).

In New York, "[t]he sittings of every court within [the] state shall be public . . . ." See N.Y. JUD. LAW § 4 (McKinney 1968). The Appellate Division of the Supreme Court of New York held, however, that "[g]iven the display of public curiosity in this sensational murder case and the extensive media coverage it had generated in the county of venue, which necessarily 'would threaten the impaneling of a constitutionally impartial jury,' " closing the pretrial hearing to the public was a proper exercise of discretion and accorded with procedural due process. *Reilly v. McKnight*, 80 A.D.2d 333, 335, 439 N.Y.S.2d 727, 729 (3d Dep't), *aff'd*, 54 N.Y.2d 1002, 430 N.E.2d 922, 446 N.Y.S.2d 45 (1981).

169. Interview, *supra* note 164. The conviction was affirmed. *People v. Timmons*, 65 A.D.2d 680 (1st Dep't), *appeal denied*, 45 N.Y.2d 972 (1978).

The Wisconsin Court of Appeals has held that the presence of a court observer group called "Concerned Citizens Against Crime," during a defendant's preliminary hearing did not constitute prejudicial community pressure. *State v. Cooper*, No. 77-819-CR (Wis. Ct. App. 1979) (unpublished limited precedent opinion available on LEXIS, States library, WI file) (conviction of defendant for attempted murder and armed robbery and consecutive sentences of 30 years and 10 years for each count, respectively, affirmed).

170. The goal of ACAE was the elimination of lenient sentences for defendants convicted of crimes against the elderly. The goal of the "Law and Order Campaign Committee" (LOCC) of California was described as the weeding out of "soft-headed" judges up for re-election. See P. NEJELSKI, *supra* note 162, at 7; Tell and Winer, *Soft Justice: The Hard Facts*, Nat'l L.J., Jan. 5, 1981, at 1, col. 1; Work, *Rightists Target Calif. Judges*, Nat'l L.J., Jan. 7, 1980, at 1, col. 1. In California, trial judges are initially appointed by the governor but must be reelected. "[L]iberals on the California bench see LOCC and its campaign funds as a serious threat." *Id.*, at 8, col. 2. As shown by a 1978 study, there is a direct correlation between campaign spending and receiving the most votes. *Id.*, at 8, col. 2. Another California group, "Citizens for Law and Order" (CLO) of Alameda County, shares the same goal. See Stecich, *supra* note 162, at 472; Tell and Winer, *supra*, at 1, col. 1. This latter group also initiates recall of judges who are unduly lenient and pressures for stricter sentencing practices. Stecich, *supra* note 162, at 472. Many have conceded that the CLO's court watching has had an impact on the disposition of criminal cases in Alameda County. The director of the Alameda County Bar Association has maintained, however, that CLO has had no impact on judges with integrity. *Id.* at 473.



most importantly, demonstrating to the legal community that local citizens are concerned about the courts and the judicial process.<sup>171</sup> One trial judge believes that deterrence is a “myth” because in most cases “no one knows or cares what happens to the run-of-the-mill criminals who are tried in state courts.”<sup>172</sup> The increased visibility of court-watching groups at trials and sentencing proceedings, however, may help to make the “myth” more of a reality.

#### D. Pressure From the Press

In this age of mass communication, expression of public sentiment and press coverage are closely interwoven.<sup>173</sup> The press not only reports, but also “reflects and shapes the community’s pattern of thought.”<sup>174</sup> Recognizing this, courts may look to the media to ascer-

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171. Stecich, *supra* note 162, at 474-77. The head of the Westchester County branch of the Gray Panthers, for example, organized a group to watch a local court for one year. One of the purposes of the group was education of its members through observation. The group noticed that judges treated the defendants “too casually.” One of the defendants, for example, had harassed a witness with a threatening gesture—drawing his hand across his throat—and the judge seemed to ignore it. One member of the group had the opportunity to express her views to the judge regarding her distress over such a “lack of decorum” and the leniency of sentences. Telephone interview with Meredith Colton, convener of Gray Panthers of Westchester County (July 9, 1982).

172. L. FORER, *supra* note 20, at 49.

173. *People v. Harris*, 28 Cal. 3d 935, 949-50, 623 P.2d 240, 247, 171 Cal. Rptr. 679, 686, *cert. denied*, 454 U.S. 882 (1981) (conviction for murder, kidnapping, robbery, receiving stolen property, and possession of arms and death penalty affirmed; pretrial publicity did not affect fairness of trial).

174. *Id.* at 974, 623 P.2d at 262, 171 Cal. Rptr. at 701 (Bird, C.J., dissenting). There is the danger that exposure of an issue by the news media may be sensationalistic and the news item may mislead the reader into thinking that the view expressed by the particular news item represents the voice of public opinion in general.

Newspapers that have large circulations have great potential to shape a community’s pattern of thought. The New York Post, for example, had a readership of 960,000 as of Jan. 20, 1983 in the New York metropolitan area. News items published in the New York Post, therefore, potentially have the power to inflame the community or create local issues. For example, the following articles appeared on the same page on the same day: *DA: Freeing Potential Killer is Nuts, Is This Justice?*, N.Y. Post, July 13, 1982, at 3, col. 6; *Killer Gets ‘Life Without Hope’, This is Justice*, *id.*

In a recent article in the New York Daily News, *Soft judges, Hard-core crooks, Junk Justice*, criminal court judges were attacked for their leniency:

Gerald Fudge doesn’t understand why the city’s Criminal Court kept letting him go . . . [o]ver the past five years, he’s run up 39 arrests and 29 convictions. . . . The answers are very simple—appallingly simple. In New York City, there’s no such thing as a tough Criminal Court Judge. There are only degrees of soft. And there are far too many judges who are afraid to start handing out stiff sentences.

Daily News, July 20, 1982, at 4, col. 1.

tain societal bias or hostility toward an accused<sup>175</sup> and criticism of the judiciary.

Several landmark Supreme Court cases have involved criminal contempt convictions of defendants who published articles or editorials which allegedly caused disrespect for a court or prejudiced its decision.<sup>176</sup> The Supreme Court has recognized that the judiciary may be "sensitive to the winds of public opinion."<sup>177</sup> The power of contempt, however, is not to be used by the courts to stifle public opinion because "[j]udges are supposed to be men of fortitude, able to thrive in a hardy climate."<sup>178</sup> Only where there is a "clear and present danger" of a "substantive evil" may the first amendment freedoms of speech and press be abridged.<sup>179</sup>

In *Pennekamp v. Florida*,<sup>180</sup> the Supreme Court reversed a contempt citation entered against a newspaper publisher and an editor for inaccurately reporting court proceedings and suggesting that the judges were biased in favor of defendants.<sup>181</sup> The Court held that the

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175. *Harris*, 28 Cal. 3d at 975, 623 P.2d at 262, 171 Cal. Rptr. at 701 (Bird, C.J., dissenting).

176. In *Bridges v. California*, 314 U.S. 252 (1941), a union officer sent a telegram to the Secretary of Labor, which was published in the newspaper, calling the judge's decision in the case outrageous and threatening a strike if it were enforced. *Id.* at 275-76. The telegram was published while a motion for a new trial was pending in a case involving a dispute between two unions. *Id.* In *Times-Mirror Co. v. Superior Court*, 314 U.S. 252 (1941), considered jointly with *Bridges*, a newspaper publisher and its managing editor were cited for contempt for publishing three editorials. One of the editorials stated that the judge would make a "serious mistake" if he granted probation to two members of a labor union who were convicted of assault of non-union truck drivers. *Id.* at 271-72. In both cases, the Court reversed the contempt convictions, *id.* at 278, holding that there must be a "clear and present danger" of a "substantive evil" before first amendment freedoms of speech or press would be abridged. *Id.* at 262-63. The "degree of imminence" of the "substantive evil," namely, disrespect for the judiciary and interference with the fair and orderly administration of justice in a pending case, must be extremely high. *Id.* at 263, 270. The Court stated that "[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion," which prizes the "privilege [of] speak[ing] one's mind . . ." *Id.* at 270. The editorial in question "did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition . . ." *Id.* at 273. In his dissenting opinion, Justice Frankfurter made the distinction between press "comment" and "intimidation." *Id.* at 291 (Frankfurter, J., dissenting). He maintained that the state's action was justified because a powerful newspaper was attempting to intimidate a judge "who within a year would have to secure popular approval if he desired continuance in office." *Id.* at 299.

177. *Craig v. Harney*, 331 U.S. 367, 376 (1947).

178. *Id.*

179. *Bridges*, 314 U.S. at 262-63.

180. 328 U.S. 331 (1946).

181. *Id.* at 337-39.

threat to fair judicial administration did not pose a "clear and present danger" as the criticism was of judicial action already taken in non-jury proceedings.<sup>182</sup> In his concurring opinion, Justice Frankfurter stressed the obligation of the press to "criticize and to advocate . . . with the fullest sense of responsibility. . . . It should not and may not attempt to influence judges or juries before they have made up their minds on pending controversies."<sup>183</sup>

One year later, in *Craig v. Harney*,<sup>184</sup> the Court reversed a contempt conviction of a publisher and newspaperman who had unfairly reported a case in which a new trial motion was pending.<sup>185</sup> The Court held that to punish for contempt, the danger must not merely be a likely or probable threat to the administration of justice, rather, "it must immediately imperil."<sup>186</sup>

The case of Bernard Bergman<sup>187</sup> illustrates the intensity with which today's press may pressure a judge to impose a severe sentence. As a result of New York investigations of nursing homes, Bernard Bergman, a prominent figure in the nursing home business, was indicted by both federal and New York State grand juries.<sup>188</sup> The press had been actively covering the investigations prior to Bergman's indictments and, according to one commentator, "tr[ying] and convict[ing] him of almost every crime . . . imaginable" related to his control of dozens of substandard nursing homes in New York State.<sup>189</sup> Pursuant to a plea agreement reached between the federal and state prosecutors, Bergman pleaded guilty in the New York State Supreme Court

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182. *Id.* at 348-50. The editorials and cartoon complained of technicalities and delays which seemed to give excessive protection to defendants. *Id.* at 367-68. (Frankfurter, J., concurring).

183. *Id.* at 365. "To deny that bludgeoning or poisonous comment has power to influence, or at least to disturb, the task of judging is to play make-believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure." *Id.* at 359.

184. 331 U.S. 367 (1947).

185. *Id.* at 376-78.

186. *Id.* at 376.

187. 57 A.D.2d 749, 395 N.Y.S.2d 872 (1st Dep't), *appeal denied*, 42 N.Y.2d 890, 366 N.E.2d 885, 397 N.Y.S.2d 1031 (1977).

188. *Bergman v. Lefkowitz*, 569 F.2d 705, 706-07 (2d Cir. 1977) (denial of writ of habeas corpus based on defendant's claim that state prosecutor breached plea bargain agreement affirmed). The federal grand jury indicted Bergman for filing false tax returns, submitting false Medicaid claims, making fraudulent statements to the government, and conspiring to defraud the government and commit the above offenses. The state grand jury indicted him for conspiracy, filing fraudulent reimbursement claims, larceny, and obstruction of governmental administration. *Id.*

189. A. DERSHOWITZ, *THE BEST DEFENSE* 118 (1982).

to making unlawful payments to a state legislator, and in the United States district court<sup>190</sup> to filing false tax returns and defrauding the federal government. The plea agreement also specified that the special state prosecutor was to recommend to the state court that no sentence additional to that imposed by the federal court be imposed.<sup>191</sup>

United States District Court Judge Marvin Frankel sentenced Bergman to four months' imprisonment.<sup>192</sup> The public response to the sentence was "immediate, substantial and generally adverse."<sup>193</sup> The media outcry was "deafening: the newspapers, radio and television stations condemned the sentence."<sup>194</sup> The *New York Times*, for example, printed excerpts from Judge Frankel's sentencing memorandum, the full text of the special state prosecutor's press statement<sup>195</sup> and an editorial which expressed the opinion "that the sentence made 'the odds on white-collar crime look rather good' and could 'only reinforce cynicism about the realities of equal justice under law.'"<sup>196</sup> New York Supreme Court Justice Melia subsequently sentenced Bergman to a

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190. According to the plea bargaining agreement, Bergman was to plead guilty in federal court to filing false tax returns and knowing and willful participation in a scheme to defraud the federal government, including submission of false Medicaid claims, *Bergman v. Lefkowitz*, 569 F.2d at 707 n.3; *United States v. Bergman*, 416 F. Supp. 496, 498 (S.D.N.Y. 1976), and in state court to making unlawful payments to Albert Blumenthal of the New York State Legislature. *Bergman v. Lefkowitz*, 569 F.2d at 707 n.3.

191. *Bergman v. Lefkowitz*, 569 F.2d at 707 n.3.

192. *United States v. Bergman*, 416 F. Supp. at 497.

193. *Bergman v. Lefkowitz*, 569 F.2d at 711 (quoting the district judge).

194. A. DERSHOWITZ, *supra* note 189, at 135.

195. *Bergman v. Lefkowitz*, 569 F.2d at 711. In his press statement, the Special State Prosecutor expressed extreme disappointment with the federal sentence and questioned whether justice had been accomplished. He stated that the sentence, which he termed "special justice for the privileged," generated extreme cynicism among the people. He claimed that those who have "abused the elderly" and "fashioned for themselves a life of luxury, must learn that they will go to jail for their crimes." *Id.* at 710 n.9.

A recent example of a prosecutor releasing a statement to the press concerning sentencing occurred when District Attorney Elizabeth Holtzman released a letter she had written to Justice Lombardo of the New York State Supreme Court. In the letter she urged a 4-to-12 year sentence for the defendant who had pleaded guilty to manslaughter for intentionally starving her baby to death. Justice Lombardo said he intended to give her five years probation and require her to undergo psychiatric treatment. The defendant had faced a maximum prison term of 15 years for second degree manslaughter. The justice charged that the District Attorney told reporters that "probation 'would be a total travesty of justice' and expressed hope that the judge would 'reflect' on the 'public outcry.'" *Holtzman Stand Upsets Judge*, N.Y. Times, July 29, 1982, at B3, col. 5-6.

196. *Bergman*, 569 F.2d at 711. The New York Post was concerned about whether the sentence established " 'any serious deterrent to new nursing home fraud.'" *Id.* The Daily News spoke of " 'powder-puff treatment.'" *Id.*

one-year term of imprisonment, consecutive to the federal sentence,<sup>197</sup> thereby departing from the plea agreement.<sup>198</sup> One commentator has indicated that the state sentence may have resulted, in part, from the intense pressure on the judge to impose a stiffer sentence than that imposed in federal court.<sup>199</sup> Although the press criticism was of judicial action already taken, as in *Pennekamp*, the criticism may have influenced pending proceedings, as in *Craig*. Given the Court's holdings in these cases, however, it would be difficult even under the circumstances presented in the *Bergman* cases, for any court to thwart the press' first amendment freedoms.<sup>200</sup>

### E. Political Pressure

In *People v. Bergman*,<sup>201</sup> there was also considerable political pressure on the state judge to impose a harsh sentence. New York State Assemblyman Andrew Stein, chairman of a state investigation of nursing homes, voiced his indignation to the press and later wrote and called upon Justice Melia to urge a stricter sentence.<sup>202</sup> He also urged New Yorkers to write letters to the judge asking for " 'the harshest sentence legally permissible' " <sup>203</sup> and organized a march outside the judge's chambers on the day of sentencing.<sup>204</sup>

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197. *Id.* at 713.

198. See note 190 *supra*. The state judge had asserted repeatedly that he was not bound by the special prosecutor's recommendations, *Bergman v. Lefkowitz*, 569 F.2d at 708, 710, though he would give them substantial weight. *Id.* at 714. His stated reasons for imposing a sentence in addition to the federal sentence were the seriousness of the state crime to which the federal judge had given little consideration and the defendant's efforts to avoid restitution. *Id.* at 714-15.

199. A. DERSHOWITZ, *supra* note 189, at 121, 125. The commentator, A. Dershowitz, was counsel for defendant Bergman.

200. A different problem was presented in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), in which "freedom of press" did not extend to endangerment of defendant's right to a fair trial. *Sheppard* was a habeas corpus proceeding in which the defendant, a doctor, was convicted of murdering his wife. *Id.* at 335. The Court held that the defendant was deprived of a fair trial consistent with due process because of prejudicial news publicity. "[B]edlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom. . . ." *Id.* at 355. The Court also noted that the case came on for trial two weeks before the general election in which both the chief prosecutor and the judge were running. *Id.* at 342. For another case involving jury prejudice due to massive pretrial publicity, see *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), *cert. denied*, 430 U.S. 986 (1977).

201. 57 A.D.2d 749, 395 N.Y.S.2d 872 (1st Dep't), *appeal denied*, 42 N.Y.2d 890, 366 N.E.2d 885, 397 N.Y.S.2d 1031 (1977).

202. *Bergman v. Lefkowitz*, 569 F.2d at 711.

203. A. DERSHOWITZ, *supra* note 189, at 120.

204. *Id.* at 136.

The defendant Bergman had argued that because the state judge was an elected official, the potential for prejudice was heightened.<sup>205</sup> Although the court admitted that "elected judges are more subject to the passions of the times [than are federal judges with life tenure],"<sup>206</sup> the court pointed out that nowhere is there "authority for the proposition that a defendant has a constitutional right to a state judiciary independent from all political pressures. It is assumed, rather, that the judiciary is capable of dispensing dispassionate justice regardless of the type or amounts of pressure put on it."<sup>207</sup>

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205. *Bergman v. Lefkowitz*, No. 77 Civ. 3344 (S.D.N.Y. Oct. 5, 1977) (available on LEXIS, Genfed library, Cases file), *aff'd*, 569 F.2d 705 (2d Cir. 1977).

206. *Id.* Many states authorize selection of trial judges by the election process. See J. RYAN, A. ASHMAN, B. SALES & S. SHANE-DUBOW, *supra* note 133, at 122.

207. *Bergman v. Lefkowitz*, No. 77 Civ. 3344 (S.D.N.Y. Oct. 5, 1977) (available on LEXIS, Genfed library, Cases file), *aff'd*, 569 F.2d 705 (2d Cir. 1977). Nevertheless, a New York Supreme Court justice recently expressed the fear that should he run for reelection, he would lose because of a particularly unpopular lenient sentencing decision to which the press and New York City Mayor Edward Koch had devoted much attention. Interview with Justice of New York Supreme Court, New York County, in New York City (to remain anonymous by request) (July 15, 1982). The justice further stated that the combination of pressure from the press, the public and the mayor would undoubtedly result in his defeat. He noted that many of his judicial colleagues shared similar worries, in that they feared that if they did not mete out harsh sentences, they would not be reelected or reappointed. *Id.* Along similar lines, when Judge Stone was asked whether "being strong is a deterrent to reappointment [or] reelection," he replied, "Yes, definitely." W. GAYLIN, *supra* note 133, at 111.

The *Trowbridge* case, 95 Idaho 640, 516 P.2d 362 (1973), discussed in text accompanying notes 117-24 *supra*, illustrates the potential for a trial judge to be influenced by the sentiments of voters, who represent an economically or politically powerful group in a given community. In that case, a range rider was given a five year prison term for stealing calves. The desire of the ranching community to make an example of this defendant, a first felony offender, was noted in the presentence report. *Id.* The *Aldoupolis* case, discussed at notes 1-14 *supra* and accompanying text, illustrates the potential for a trial judge to be influenced by the sentiments of voters and the governor, see notes 7-8 *supra* and accompanying text, in that the trial judge revoked suspended sentences of convicted rapists after public outcry.

While the subject of parole is beyond the scope of this Comment, political pressure, instigated by public opinion, can have an effect on parole decisions. William Fain was serving a life sentence for murdering a 17-year old boy and raping two young women. He was held past his scheduled parole date on two occasions, because of public and political pressure. Bishop, *For Your Information*, 9 CRIM. DEF. 4 (1982). When his parole date became imminent the first time, the parole board "bec[a]me aware of public outrage, impressive in its vehemence and the number of people expressing it . . ." *In re Fain*, 65 Cal. App. 3d 376, 394, 135 Cal. Rptr. 543, 553 (Ct. App. 1976). The court found that the public's outcry was "new information" which the parole board was required to consider, *id.*, and that rescission of parole was proper. *Id.* at 382, 135 Cal. Rptr. at 545. One legislator also protested Fain's release. *Id.* at 385, 135 Cal. Rptr. at 547. When Fain came up for parole again, the murder victim's family and friends organized a " 'Keep Fain In Committee' " and

There has been extensive debate concerning whether judges, like legislators, should be responsible to the electorate.<sup>208</sup> On one side of the issue is the professional concern for judicial independence, and on the other, the public concern for judicial accountability.<sup>209</sup> Some commentators believe that specific judicial decisions ought not to be the subject of public review.<sup>210</sup> According to this view, the reflection of the unpopularity of a decision in election results is an "improper and unfortunate restraint on judicial integrity and independence and frequently causes the political defeat of a good judge."<sup>211</sup> Direct elections, therefore, are thought to be harmful to the judicial system "because of the public's ignorance of the standards and rules by which judges are governed."<sup>212</sup> Conversely, it has been argued that it is inconsistent with the concept of democratic government to isolate the judiciary entirely from some kind of accountability.<sup>213</sup>

The necessity for accountability is exemplified in a recent Wisconsin case in which a state judge called a five-year old victim of a sexual

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obtained 62,500 signatures on a petition which stated that he was too dangerous for release. Bishop, *supra*. The state legislature urged the parole board to reconsider and the board subsequently denied Fain's release. *Id.*

208. Mendelson, *Problems of Judicial Independence and Accountability*, 53 FLA. B.J. 138, 140 (1979). See P. DUBOIS, FROM BALLOT TO BENCH, JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 20-28 (1980).

209. Mendelson, *supra* note 208, at 138.

210. A recent New Jersey case illustrates the potent effect public and political pressure may have on a judicial proceeding. The defendant was convicted of "carnal abuse" and "debauching the morals of a minor" and was initially sentenced to a custodial term of fifteen years. The defendant claimed that any sentence of incarceration was cruel and unusual punishment as being life threatening because of his obesity. Physical examination of defendant confirmed that incarceration would be life threatening. At the reconsideration-of-sentence hearing, the trial court vacated the prison sentence and sentenced defendant to three years probation and a \$2,000.00 fine. Telephone interview with counsel for defendant [hereinafter cited as Defense Interview], in *State v. Giorgianni*, 91 N.J. 255 (1982) (mem.). The Attorney General of the State of New Jersey and a member of the General Assembly advocated reincarceration of the defendant and removal or impeachment of the sentencing judge. Defense Interview, *supra*. The prison sentence was ultimately reimposed, *id.*, and one may speculate whether political pressure and/or public opinion influenced the reimposition of sentence, and if so, whether it was proper for the judge to "reflect on the public outcry." See note 195 *supra*.

211. See, e.g., Mendelson, *supra* note 208, at 138. Sentencing decisions of judges, however, are not often exposed to public scrutiny and most sitting judges are usually reelected. P. DUBOIS, *supra* note 208, at 32-33. An individual judge may be defeated when the press stirs the public to anger by means of sensationalistic reporting or when there is organized opposition in a competitive election. See notes 170 & 174 *supra* and accompanying text.

212. Mendelson, *supra* note 208, at 138.

213. *Id.* at 140.

assault "an unusual, sexually promiscuous young lady" and placed her attacker on probation.<sup>214</sup> The residents of the town began a campaign to recall the state judge from office.<sup>215</sup>

In theory, the electorate may hold a judge accountable for specific sentencing decisions through election and recall. As a practical matter, however, these means of accountability are not often employed.<sup>216</sup> The methods by which the appointing power holds the judiciary accountable are perhaps more potent in those jurisdictions which provide for appointment rather than election to the bench, since the appointing process itself can be a tool for ensuring that particular types of persons fill judicial positions.<sup>217</sup> Although presidents, governors or mayors, who may expect appointees to "hew to the party line" have often been surprised to learn that judges are independent,<sup>218</sup> judicial independence<sup>219</sup> may be curtailed when the appointing power voices an opinion on sentencing, as in *Aldoupolis*.<sup>220</sup> It is difficult to determine whether the statements of a governor, for example, will cause a judge to deliberate more thoughtfully in future sentencing or whether these statements merely institute fear in relation to future career prospects.

214. *Victim, 5, 'Promiscuous,' Her Attacker Gets Probation*, Nat'l L.J., January 25, 1982, at 3, col. 3. The judge's reasons for the lenient sentence was that the child "initiated" the sexual contact with the defendant, a 21-year old man, who "did not know enough to knock off her advances . . ." *Id.*, at 37.

215. *Id.*, at 3, col. 3.

216. See P. NEJELSKI, *supra* note 162, at 4.

217. The bench is relatively homogeneous. See note 133 *supra*. Until significant diversification occurs, "courts struggle to maintain their legitimacy in the eyes of the citizenry." J. RYAN, A. ASHMAN, B. SALES & S. SHANE-DUBOW, *supra* note 133, at 141.

218. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979).

219.

"Judicial Independence" has several definitions: By one definition, independence refers to the freedom of the judge, from any external influences which might impair his or her impartiality . . . and his or her ability to decide each case "on its own merits." In a much broader view of the concept, judicial independence refers to the ability of the judiciary to perform its functions of judicial review . . . without fear of retribution by the elected branches or the population at large.

P. DUBOIS, *supra* note 208, at 20-21. Historically, the term "judicial independence" referred to "the independence of the judiciary . . . from other branches of government," i.e., the separation of powers. Kaufman, *supra* note 218, at 713. According to Judge Marvin Frankel, "judicial independence" means that "judges are to be sheltered from the clamor of the mob and from immediate punishment or reward for their decisions." M. FRANKEL, *supra* note 38, at 67.

220. See note 8 *supra* and accompanying text.



## IV. Victims

Victims have been the "forgotten people in the system"<sup>221</sup> because the only parties in a criminal proceeding are the state and the defendant.<sup>222</sup> Generally, they have had no official role except to provide evidence.<sup>223</sup>

An example of abusive judicial treatment of a victim is set forth in *People v. Beasley*.<sup>224</sup> The victim, a twenty-two year old woman, was abducted, robbed, raped, and terrorized with threats of mutilation and death by three men.<sup>225</sup> She was subsequently directed to be present at the probation hearings and was accompanied by a police officer. The trial judge castigated the officer and his superior for their solicitude toward the victim.<sup>226</sup> The California Court of Appeal noted

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221. CRIMINAL JUSTICE AND THE VICTIM 17 (W. McDonald ed. 1976) (quoting Judge Murphy of the Superior Court of the District of Columbia, 1971).

There is an enormous amount of literature on the offender: his rights; the role he plays in criminal process; his perceptions of that process; the influence which that process has and the damage that it can do to his life's prospects by labeling him a criminal; his racial, social, economic, marital, psychological, physical, and behavioral characteristics; and even the effects of his incarceration on his family. Not only is the literature vast but the expenditure of money and concern for the defendant has also been enormous . . . . In comparison, virtually nothing has been done on what happens to the other group of citizens touched by the criminal justice system, namely, the victims.

*Id.* at 19. See also *Victim/Witness*, *supra* note 72, at viii ("these individuals are generally either ignored by our legal and social institutions or used by them as tools to identify and punish offenders"); L. FORER, *supra* note 20, at 29 ("in the conduct of the trial, the victim is a non-person"); H. Brownell, *The Forgotten Victims of Crime*, Thirty-Second Annual Benjamin N. Cardozo Lecture Delivered Before The Association of The Bar of the City of New York (Mar. 4, 1976).

222. Statement of Judge Sylvia Bacon, Immediate Past Chairperson, on behalf of the Criminal Justice Section of the ABA, Before The President's Task Force on Victims of Crime 5, Washington, D.C. (Sept. 15, 1982) [hereinafter cited as Bacon].

223. Bacon, *supra* note 222, at 5-6.

224. 5 Cal. App. 3d 617, 85 Cal. Rptr. 501 (Ct. App. 1970).

225. *Id.* at 622, 85 Cal. Rptr. at 503, 504. The men then discussed whether to kill her or disfigure her face. The victim averted the danger by promising to help stage a hold-up of the hotel the following night, where she would be working as cashier. *Id.* at 504. The men were subsequently arrested and indicted for rape, kidnapping and robbery. *Id.* In the plea negotiations, an agreement was reached whereby two of the defendants would plead guilty to the robbery charge and one of the rape charges, and in return the judge promised to send one of them to the California Youth Authority and to dismiss the remaining charges. The other defendant would receive a suspended sentence and be placed on probation. *Id.* at 623-24, 85 Cal. Rptr. at 504-05. The probation officer recommended denial of probation. *Id.* at 625, 85 Cal. Rptr. at 506.

226. The judge stated: "I think it's a lousy deal when an inspector has to sit with a client . . . . I think it's ridiculous . . . . I never heard of a sentencing procedure where people have to be in court with a policeman holding their hand." *Id.* at 625 n.6, 85 Cal. Rptr. at 506 n.6.

that the defendants were at liberty on bail after their guilty pleas and that “[i]t seems idle even to point out that [the victim] should not be obliged to chance an unescorted confrontation with her self-confessed ravagers or their friends.”<sup>227</sup> The court also noted that the trial judge’s “incomprehensible tirade” against the victim and the police officer attending her, “obviously discouraged . . . her testimony as to the details of the offense.”<sup>228</sup>

Some states are attempting to redress the lack of victim participation in the criminal justice system and the problems inherent in possible prosecutorial or judicial bias against victims by enacting statutes which mandate that victims be provided with information concerning the proceedings.<sup>229</sup> One such statutory scheme, for example, mandates that the District Attorney inform the victim of a pending plea bargain and of the date when the court will consider the recommendations, so that the victim may be present.<sup>230</sup> This notification procedure was designed to “help alleviate some of the confusion and alienation a victim often feels and encourage victim cooperation in the prosecution.”<sup>231</sup>

Additional legislation in several states allows victims “to inform the prosecutor, judge or jury of the crime’s impact on their lives.”<sup>232</sup> In New York, for example, a presentence report must “contain an analysis of the victim’s version of the offense, the extent of injury or economic loss or damage and the amount of restitution sought by the victim,” when the information is relevant to the question of sentence.<sup>233</sup> New York also specifies that one of the purposes of the penal law is “to provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim’s family and the community.”<sup>234</sup>

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227. *Id.* at 626, 85 Cal. Rptr. at 507.

228. *Id.* at 633, 85 Cal. Rptr. at 511-12. The court ultimately reversed the granting of probation to one of the defendants because it found that the judge abused his discretion by deciding the issue of probation long before he possessed all the relevant facts. *Id.* at 633, 85 Cal. Rptr. at 511. The court also held that the dismissal of kidnapping and rape charges was an abuse of discretion. *Id.* at 638, 85 Cal. Rptr. at 514.

229. *Victim/ Witness*, *supra* note 72, at 28.

230. *Id.* at 30.

231. *Id.* at 29.

232. *Id.* at 46. Indiana, Nevada, New Hampshire, New York and Ohio, for example, have such statutes. *See, e.g.*, IND. ADMIN. R. 35-5-6-4 (Burns 1979); NEV. REV. STAT. § 176.145 (1981); 1979 N.H. LAWS 330 (SB 79); N.Y. CRIM. PROC. LAW § 390.30(3) (McKinney Supp. 1982-1983); OHIO REV. CODE ANN. § 2947.051 (Page 1982).

233. N.Y. CRIM. PROC. LAW § 390.30(3) (McKinney Supp. 1982-1983).

234. N.Y. PENAL LAW § 1.05(5) (McKinney Supp. 1982-1983).

A recently enacted federal law provides that the presentence report must contain "information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense."<sup>235</sup>

As the A.B.A. has noted, victim impact statements are likely to result in stiffer sentencing by emphasizing the consequences to the victim, as well as the motives of the defendant.<sup>236</sup> The goal of considering the offender, the offense and the victim, however, is to arrive at a just and effective sentence. Such a sentence is not necessarily a lengthy one. As commentators have stated that prison does not rehabilitate,<sup>237</sup> alternatives to imprisonment should increasingly be used when the crime is not a violent one.<sup>238</sup>

Concern has also been expressed that allowance for oral presentation by victims may present the possibility of emotional outburst from

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235. Omnibus Victims Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, 1249.

236. *Victim/Witness*, *supra* note 72, at 47.

237. "Rehabilitation is sometimes called 'treatment.' Imprisonment as treatment? It would be laughable if it were not so tragic." L. FORER, *supra* note 20, at 86; Frankel, *supra* note 24, at 31.

238. B. ALPER & L. NICHOLS, *BEYOND THE COURTROOM* 56-58 (1981). Restitution is one such alternative. One restitutionary scheme is that of the self-determinate sentence, whereby prisoners could work a forty-hour work week at full union rates until their crimes were paid for from their earnings. This scheme would encourage their ability as wage-earners and would increase awareness that crime "is not a paying proposition." *Id.* Other alternatives are pretrial diversion, where young offenders charged with offenses other than violent crimes are taught skills, placed in jobs, counseled and referred to appropriate community agencies. *Id.* at 39-45. For a discussion of community service as an alternative sentence to imprisonment, see *id.* at 175-94.

The Omnibus Victims Protection Act of 1982 also provides for restitution as an alternative to imprisonment or as an addition to imprisonment. If the court does not order restitution, it must state its reasons on the record. Pub. L. No. 97-291, 96 Stat. 1248, 1253. Since a primary reason for "street" criminality, see L. FORER, *supra* note 20, at 209 ("Street crime" is a term used to describe crimes other than "white-collar" crime. "Street crime is what most people mean when they talk about crime"), is the "need and deprivation on the part of disadvantaged members of society," Murphy, *Marxism and Retribution*, in *SENTENCING* 284, 293 (1981), society should do all it can to educate and aid convicts in gaining meaningful skills, so that other means of livelihood besides career crime can be learned. Perhaps columnist Art Buchwald's suggestion, though made in jest, has some kernel of merit to it: that "appropriate public service for these [white-collar] offenders would be to teach people in the slums . . . how to [draw] up phony contracts . . . [and hand] in invoices for overruns that do not exist . . ." L. FORER, *supra* note 20, at 207. Humor aside, one kind of restitutionary sentence for "white-collar" criminals might be to teach business skills to convicts who are lacking such skills, who in turn could make restitution to victims.

the victim which would unfairly prejudice the judge.<sup>239</sup> Judges can, however, be aware of a victim's pain and factor it into sentencing deliberations without being swayed to violate their consciences. The fear of emotional outbursts is not a reason for excluding victim information. This human presence may offset the "case-hardening" which may occur after years on the bench.<sup>240</sup> In any event, use of a victim impact statement instead of oral presentation by victims would preclude displays of emotion.

Because victims may be representative of those individuals who are routinely targeted for certain types of crimes,<sup>241</sup> granting them a voice in the sentencing proceedings would service large segments of the community.

### V. Conclusion

A recent amendment of the New York State Penal Law specifies that one purpose of the penal law is "to provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family and the community."<sup>242</sup> Although it is often stated that community opinion should not influence the judiciary, public response is a powerful educational tool that should not be ignored. The fear that judges will arrive at unjust sentencing decisions in slavish adherence to public will is unjustified. Cases illustrate that judicial awareness of public or community opinion does not lead inevitably to subservience in the form of violation of due process or abuse of discretion. In fact, deeper deliberation in sentencing and proportionate sentences have often been the result.

Awareness of public response to particular types of crime can lead to a more realistic appraisal of one of the factors in the sentencing equation: the relative gravity of the offense. Intelligent use of public opinion as an indicator rather than as a dictator should not lead to the actual sentences urged by the public, nor even to lengthy prison terms, but to sentences which bear relation to the gravity of the offense and do not trivialize the impact of the crime on the victim. Giving voice to victims of crime in the sentencing process would not only preclude such trivialization; it would also serve to represent large sectors of the community who are routinely targeted for specific types of crime.

*Eve Kunen*

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239. *Victim/Witness*, *supra* note 72, at 47.

240. *See, e.g.*, *People v. Beasley*, 5 Cal. App. 3d 617, 85 Cal. Rptr. 501 (Ct. App. 1970), discussed at notes 224-28 *supra* and accompanying text.

241. *See* note 20 *supra*.

242. N.Y. Penal Law § 1.05(5) (McKinney Supp. 1982-1983).

