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THE JUDICIARY AS POLITICAL STEPPING-STONE: THE CASE FOR MORE TEMPERATE DEBATE*

HONORABLE VITO J. TITONE**

So much has changed in the forty years since I and the rest of the Class of 1956 were handed our diplomas and sent out into the world to make our individual marks. We have gone from the imaginative space flights of H.G. Welles' fiction¹ to live broadcasts from real floating space shuttles. We have gone from manual typewriters, mimeograph machines, and telegrams to word processors, fax machines, e-mail, and cellular phones. We have gone from a world in which most lawyers, doctors, and accountants were white males to a world in which women and people of color represent a substantial part of these professions.²

Even the location of this law school has changed. When the Class of 1956 graduated, St. John's Law School consisted of a building in downtown Brooklyn. Now, thanks to the generosity of its benefactors, this school is housed in a modern, state-of-the-art building in Jamaica Estates.

* Remarks made at the 1996 Homecoming at St. John's University School of Law, Jamaica, New York on October 26, 1996.

** New York State Court of Appeals Associate Judge Vito J. Titone received his Bachelor of Arts degree from New York University in 1951 and his Juris Doctorate from St. John's University School of Law in 1956. Judge Titone was appointed to the New York State Court of Appeals by Governor Mario M. Cuomo in 1985.

Prepared with the assistance of my law clerk, Lisabeth Harrison (J.D., 1979, St. John's University School of Law).

¹ Herbert George Wells (1866-1946) was a renowned science fiction writer who imagined, *inter alia*, space flight and time travel. See generally H.G. WELLS, THE FIRST MEN IN THE MOON (Berkley 1967); H.G. WELLS, A MODERN UTOPIA (1905); H.G. WELLS, THE SHAPE OF THINGS TO COME (1933); H.G. WELLS, TALES OF SPACE AND TIME (1976); H.G. WELLS, THE TIME MACHINE (1963); H.G. WELLS, WAR OF THE WORLDS (Lou P. Bunce ed., 1956).

² See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1995 411 tbl.649 (115th ed.) (hereinafter STATISTICAL ABSTRACT OF THE U.S.) (listing employment demographics from 1983 and 1994 for occupations including physicians, attorneys, and accountants which demonstrate increase in percentage of women, blacks, and hispanics); see also BARBARA A. CURRAN AND CLARA N. CARSON, AMERICAN BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990s I, 3 fig.2, 4 tbl.2 (1994) (graphing steady increase in number of female lawyers in United States from three percent in 1951 to twenty percent in 1990).

The graduates of the Class of 1956, who once trembled before bar exam proctors, have gone on to become judges, high-powered lawyers, business executives, law school deans, and, in one case, a nationally-esteemed Governor.³ And, we now all have less hair, less teeth, and more girth.

Most of the changes that have occurred over the past forty years have been good ones. One change that is decidedly not for the better, however, is the increasingly strident tone of our public policy debate. Hate speech, *ad homonym* rhetoric, small-mindedness, and mockery increasingly have replaced reasoned advocacy and civilized debate.⁴ Instead of leaders who work to bring us together and improve our common lot, we have politicians who can do nothing more constructive than accuse each other of petty wrongdoing and moral transgression.⁵ Instead of commentators and media pundits who strive to inform and elevate the level of public discourse, our airwaves increasingly are filled with hucksters who ridicule decency and champion intolerance—all for the sake of a few rating points.

Nowhere is this pernicious, democracy-undermining trend more evident than in the recent shrill attacks by certain elected officials on courts and individual judges⁶—what retired Third Circuit

³ See THE NEW YORK RED BOOK 22-23 (George A. Mitchell ed., 92d ed. 1993). Mario M. Cuomo served as Governor of the State of New York from 1983 to 1995. He received an LL.B. degree from St. John's University School of Law in 1956.

⁴ See, e.g., Joe Battenfield, 'Comback Kid' Stays Above N.H. GOP Fray, BOSTON HERALD, Feb. 3, 1996, at 1 (noting Clinton decision to eschew campaign appearances to avoid political "mudslinging"); Maria L. LaGanga, *Iowans Trudge Through Mud to Reach Decisions*, L.A. TIMES, Feb. 12, 1996, at 1 (discussing voter disapproval of harsh rhetoric by presidential candidates); Stuart Taylor, Jr., *Closing Argument: 'Judge Frees Baby Molester' and Other Exaggerations*, TEXAS LAWYER, July 29, 1996, at 22 (citing first negative statewide television advertising campaign on behalf of candidate for Georgia Court of Appeals).

⁵ See generally STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994) (discussing recent nomination and confirmation process for high government officials and Supreme Court nominees). See, e.g., Alan Finder, *Candidates for Senate Use Truth, of a Sort*, N.Y. TIMES, Oct. 7, 1996, at B6 (reporting on vitriolic and hyperbolic discourse during 1996 New Jersey Senate campaign); Charles P. Frend, *What's New? Mud-Slinging is an American Tradition*, WASH. POST, Oct. 30, 1988, at C1 (describing vituperation in presidential campaign); Howard Kurtz, *The Big Sleazy: Is Clinton's Clan as Low-Rent as Reagan's?*, WASH. POST, Mar. 26, 1995, at C1 (comparing "sleaze factor" in President Reagan's administration to "character issue" in President Clinton's first term); William Neikirk and Jacquelyn Heard, *Clinton, Dole Speeches Visit Familiar Campaign Themes: Republican Focuses on Character; Crime Tops President's Agenda*, CHICAGO TRIB., June 23, 1996, at 3 (comparing partisan rhetoric in 1996 presidential campaign); *Campaign '96: Election Night Special Report/Newscast* (CBS television broadcast, Nov. 5, 1996), available in 1996 WL 8018555 (describing New Jersey Senate campaign as "naviest political campaign this year").

⁶ See John M. Goshko, *Accusations of Coddling Criminals Aimed at Two Judges in New York*, WASH. POST, Mar. 14, 1996, at A3 (quoting former New York City Police Commis-

Judge H. Lee Sarokin referred to as the “Willie Hortonizing” of the judiciary.⁷ Of course, no one would suggest that the judiciary should be immune from criticism.⁸ To the contrary, we in the judicial branch welcome public debate about the soundness and direction of our decisions.⁹ Such debate can be very constructive in elucidating the underlying policy issues and in showing us where we need to temper abstract legal analysis with practical wisdom. There is, however, an important difference between constructive substantive criticism and the destructive hailstorm of invective that has recently rained down upon federal and state level judges.¹⁰

Particularly objectionable is the practice of some of our elected officials of singling-out isolated trial court or appellate level decisions as purported examples of the courts’ so-called “coddling” of criminals.¹¹ There is little basis for the charge that our courts are

sioner William J. Bratton as stating “screwball Court of Appeals” is “living off in Disneyland somewhere. They’re not living in the streets of New York”); see also Henry J. Reske, *ABA Commission Defines Areas of Judicial Independence*, A.B.A. J., Dec. 1996, at 99 (discussing many personal attacks on judicial decisions at state and federal level by politicians); Gary Spencer, *Pataki Asks Judge to Resign; Threatens Removal by Senate*, N.Y.L.J., Apr. 23, 1996, at 1 (describing Governor’s exhortation to Judge Lorin Duckman to resign); Gary Spencer, *Protection Order Abuse Elevated to Felony*, N.Y.L.J., Aug. 9, 1996, at 1 (reporting on Governor Pataki’s charge that judges were “weak link” in criminal justice system, particularly noting Judge Duckman’s leniency); *Today’s News*, N.Y.L.J., Oct. 11, 1996, at 1 (reporting anticipated commencement of Judicial Conduct Hearings concerning Judge Lorin Duckman).

⁷ See Letter from Hon. H. Lee Sarokin, *United States Court of Appeals for the Third Circuit* to President William J. Clinton (June 4, 1996), reprinted in L. H. Pollack, *Criticizing Judges*, 79 JUDICATURE 299, 302 (May/June 1996); see also Henry J. Reske, *Pointed Resignation Judge Blasts Politicization of Judiciary*, A.B.A. J., July 1996, at 40 (reporting United States Court of Appeals Judge H. Lee Sarokin’s reason for resigning from Third Circuit bench as motivated by fact that he had become “prime target” of politicians trying to “Willie Hortonize” federal judiciary).

⁸ See Mark Green, *When Politicians Judge the Judges*, N.Y.L.J., May 6, 1996, at 2 (discussing appropriate circumstances to criticize judges); see also Richard H. Kuh, *The Importance of Being Critical*, N.Y.L.J., Oct. 17, 1996, at 2 (asserting criticism of judiciary can be used constructively to improve performance).

⁹ See, e.g., NEW YORK CITY BAR ASS’N., COMM. ON PROF’L JUD. ETHICS, Formal Op. 1996-1 (1996) (explaining parameters for public criticism of judges by lawyers).

¹⁰ See David N. Dinkins, *Judicial System Under Attack*, N.Y.L.J., June 10, 1996, at 2 (decrying harsh, inciteful rhetoric and criticism of judiciary); see also John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50 (describing attacks on judges during recent presidential campaign as “scape-judging”); Carl Wisotsky, *Attacks on Judges Tarnish Original American Dream*, N.Y.L.J., May 1, 1996, at S6 (referring to attacks by elected officials on individual judges and their decisions as “judge-bashing”).

¹¹ See John Caher, *Seven are Nominated for Opening on Court of Appeals*, TIMES UNION (Albany), Nov. 6, 1996, at B2 (reporting Governor Pataki “repeatedly characterized the high court as a panel of criminal-coddling liberals”); see also N. Lee Cooper, *Don’t Let Politicians Get Away With Blaming Judiciary for Crime Problem*, A.B.A. J., Oct. 1996, at 6 (defining “scape-judging” as “process by which one party uses anecdotes and particular cases

havens for felons or, as one tabloid put it, "a court system that criminals love."¹² Those assertions are, at best, serious distortions of the truth.¹³

The New York State Court of Appeals, which has been the subject of the most virulent attacks,¹⁴ has a lower rate of reversal in criminal cases than the current United States Supreme Court.¹⁵ Of the approximately three thousand applications for leave to appeal that we receive each year, a mere two percent succeed in having their petitions heard.¹⁶ Of those, less than one quarter—or one-half of one percent of the total—actually obtain reversals. Overall, our prison population is the highest it has ever been and every single inmate was put there by a New York State judge.¹⁷

Further, those who select isolated decisions and hold them up to public ridicule invariably fail to mention that judicial decision-making is driven not by a judge's personal wishes, but rather, by

taken out of context to suggest that judicial nominees of the other party are 'soft on crime'").

¹² This was a NEW YORK POST headline—during the period when the Governor's criticism of the Court of Appeals was at its peak. Cf., e.g., Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 87 (1995) (suggesting sentencing concessions in favor of criminal defendants lead to perception by public and state legislators of judges as "soft on crime").

¹³ See *infra* notes 15-16 (discussing low reversal statistics of Court of Appeals for criminal cases); see also Caher, *supra* note 11, at B2 (reporting "studies show the Court of Appeals almost always rules in favor of prosecution"); Norman A. Olch, *Soft on Crime? Not the New York Court of Appeals*, N.Y.L.J., May 6, 1996, at 1 (describing attacks on Court of Appeals as "unsubstantiated").

¹⁴ See Caher, *supra* note 11, at B2 (reporting Governor Pataki "repeatedly characterized the high court as a panel of criminal-coddling liberals"); Goshko, *supra* note 6, at A3 (reporting remarks of former New York City Police Commissioner referring to "screwball Court of Appeals . . . living off in Disneyland"); Olch, *supra* note 13, at 1 (quoting New York State Attorney General Dennis Vacco describing Court of Appeals as "intent on coddling dangerous criminals").

¹⁵ Compare STATISTICAL ABSTRACT OF THE U.S., *supra* note 2, at 212 tbl.338 (listing cases filed and dispositions from 1980 to 1993) with 1995 N.Y. CT. APP. ANN. REP. app. 1, 4(B) (noting 37 reversals for total number of criminal appeals and five percent decline in reversal rate from 1991 through 1995 for criminal appeals with concurrent ten percent increase in criminal appeals for same period). See generally Olch, *supra* note 13, at 1 (comparing reversal rates of New York State Court of Appeals and United States Supreme Court).

¹⁶ See 1995 N.Y. CT. APP. ANN. REP. 3, app. 1(Z) (reporting total of 3,164 applications for leave to appeal in criminal cases while granting only 89 petitions for leave to appeal in criminal matters); see also Gary Spencer, *Workload Increase at Court of Appeals*, N.Y.L.J., May 20, 1996, at 1 (noting that 3,140 criminal leave applications were received by Court of Appeals in 1995).

¹⁷ See STATE OF NEW YORK, 1995 COMMITTEE ON CRIME AND CORRECTION ANN. REP. (compiling crime and prison statistics); see also STATISTICAL ABSTRACT OF THE U.S., *supra* note 2, at 218 tbl.352 (reflecting general increase in nationwide prison population over years 1980, 1990, 1992 and 1993).

controlling statutes or long-standing precedent.¹⁸ As Supreme Court Justice Ruth Bader Ginsburg stated: "Judges must do what is legally right, even when the result is not one the home crowd wants."¹⁹ The failure to acknowledge that judges' choices are limited is especially reprehensible because most of the politician-critics have legal training²⁰ and are well aware that judges are constrained by a complex set of rules and conventions,²¹ many of which are based on statutes that were enacted—and can be changed readily—by elected, non-judicial officials.

It obviously does not serve the interests of those who trade in sound bites to linger over these facts. Politicians looking for a headline or a quick quote on the eleven o'clock news naturally prefer to play upon the heinousness of the crime or the suffering of the victims—"facts" which excite the public's passions, but which have little to do with principled judicial decision-making in a system that is based upon the rule of law.²²

¹⁸ See, e.g., *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (seminal Supreme Court case defining role of judiciary).

¹⁹ See *Clinton Nominates Ginsburg to Supreme Court*, CONG. Q. WKLY. REP., June 19, 1993, at 1599-1600 (transcribing Ruth Bader Ginsburg's comments on her nomination to United States Supreme Court and quoting Chief Justice Rehnquist as stating, "[a] judge is bound to decide each case fairly in accord with the relevant facts and the applicable law, even when the decision is not, as he put it, what the home crowd wants"); see also N.Y. JUD. LAW app., CODE OF JUDICIAL CONDUCT Canons 1 and 2 (McKinney 1992) (stating judges should "avoid appearance of impropriety in all activities and conduct themselves in manner in which integrity and independence of judiciary is preserved"); cf. *People v. Grasso*, 162 Misc. 2d 84, 616 N.Y.S.2d 156 (Sup. Ct. Richmond County 1994) (noting "[l]egal disputes must perforce be decided upon sound legal reasoning and not influenced by pressure of public sentiment").

²⁰ See N.Y. STATE BAR ASS'N., LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY EC 8-6 (1994). This provision of the Code provides:

While a lawyer as a citizen has a right to criticize [judges and administrative officials] publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

Id.; see also NEW YORK CITY BAR ASS'N., COMM. ON PROF'L JUD. ETHICS, Formal Op. 1996-1, (1996). This organization condones a lawyer's criticism of a particular sitting judge only if it is well-founded. *Id.* See generally Whitney North Seymour, Jr., *Defending the Judiciary - An Open Letter to the Bar*, 38 N.Y. STATE BAR NEWS, Mar./Apr. 1996, at 1. The most vociferous "judge-baiters" include the governor, members of the legislature and various mayors. *Id.*

²¹ See N.Y. JUD. LAW app., CODE OF JUDICIAL CONDUCT (McKinney 1992 & Supp. 1994); MODEL CODE OF JUDICIAL CONDUCT (1990). See generally Robert F. Housman, *The Ethical Obligations of a Lawyer in a Political Campaign*, 26 U. MEM. L. REV. 3 (1995).

²² See Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 535 (1996) (noting former President George Bush's campaign declared "the war on crime will not be won until liberals stop coddling criminals"); see also Symposium, *Foreword, Faults, Fallacies, and the Future of Our Criminal Justice System*, 3 VA. J. SOC. POL'Y & L. 1, 1 (1996) (opining politicians won elected offices in 1995 by "asserting a tough stance against

Additionally, the kind of criticism that exploits fear and prejudice rather than educates is a particularly cynical and cowardly form of demagoguery because its targets, the judges who wrote or voted for the challenged decisions, operate under a strict code of ethics and custom that prevents them from responding.²³ Because they are ethically prevented from making public comment,²⁴ judges are easy prey for irresponsible politicians who would take advantage of the immediate gain to be had from stirring up public fears, thereby diverting the public's attention from the real causes of crime in our society.²⁵

On this point, I cannot emphasize strongly enough that we in the judicial branch of government are not responsible for the occurrence of crime.²⁶ We do not commit crimes and we do not have the tools to prevent others from committing them. Those tools are

crime and against a system that purportedly coddles criminal defendants"); Green, *supra* note 8, at 2 (outlining three principles for politicians who engage in criticizing judges); Jon O. Newman et al., *Second Circuit Chief Judge Criticizes Attacks on Judge Baer*, LEGAL TIMES, Apr. 1, 1996, at 12 (stressing attacks on federal bench disserves Constitution and creates danger of seriously misleading American public as to proper role of federal judiciary).

²³ See N.Y. JUD. LAW app., CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (McKinney 1992) (stating that judges should refrain from commenting on pending or impending proceedings of court); MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (1990) (stating judges shall not during pending or impending proceeding "make public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing . . .").

²⁴ See N.Y. JUD. LAW app., CODE OF JUDICIAL CONDUCT Canon 3A(6) (McKinney 1992) (stating "[a] judge should abstain from public comment about a pending or impending proceeding in any court", but "does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court"); see also MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(9) (1990) (prohibiting "public comments when they "might reasonably be expected to affect [trial's] outcome or impair its fairness"); Marjorie E. Gross, *Updated Rules on Judicial Conduct*, N.Y.L.J., May 14, 1996, at 1 (noting state bar ethics committee retained "no public comment" approach of ABA's Model Code of Judicial Conduct in order to maintain public perception of judicial impartiality). *But see* People v. Lazzaro, 580 N.Y.S.2d 43, 44 (N.Y. App. Div. 1992) (concluding judge's comments in newspaper article explaining court procedure did not violate Code of Judicial Conduct).

²⁵ See STATE OF NEW YORK, 1995 COMMITTEE ON CRIME AND CORRECTION ANN. REP. (compiling crime and prison statistics); see also STATE OF NEW YORK, JOINT LEGISLATIVE COMMITTEE ON CRIME, ITS CAUSES, CONTROL AND EFFECT ON SOCIETY (studying crime in New York State from 1968 to 1973); Meredith McLain, "Three Strikes and You're Out": *The Solution to the Repeat Offender Problem?*, 20 SETON HALL LEGIS. J. 97, 124-26 (1996) (identifying poverty, homelessness, and erosion of family as root causes of crime in United States); Symposium, *The State of Civil Liberties: Where Do We Go From Here?*, 27 HARV. C.R.-C.L. L. REV. 575, 624 (1992) (discussing how real causes of crime must be dealt with before crime rates decrease).

²⁶ See Reske, *supra* note 7, at A40 (quoting Judge H. Lee Sarokin's complaint that judges' guarding constitutional rights of criminal defendants are seen as "being soft" on crime or causing crime).

held instead by the elected legislators, who have the authority to prohibit misconduct and prescribe punishment²⁷ and by the Executive Branch, which has the power to establish ameliorative programs, to initiate prosecutions, and to deploy police resources.²⁸ Although, one would never suspect it from the prevailing political rhetoric, the judiciary is not just another arm of the law enforcement establishment and our role is not to prevent crime.²⁹ Rather, the constitutional duty of the courts is to stand as neutral arbiters to ensure that all accused citizens are tried fairly and in accordance with the law.³⁰

In addition to distorting the import of our courts' decisions, some of our elected officials have taken the extra—and even more pernicious—steps of personally attacking our judges because of particular rulings they have made.³¹ Some of these attacks have been aimed at coercing a change of ruling.³² In one instance, a

²⁷ See U.S. CONST. art. I, § 1 (vesting legislative powers in Congress); U.S. CONST. art. I, § 8, cl. 18 (declaring power of Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers”); see also N.Y. CONST. art. III, § 1 (vesting legislative power in senate and assembly); N.Y. PENAL LAW § 1.05 (declaring general purpose of penal law is to “proscribe conduct” and “prescribe proportionate penalties”).

²⁸ See U.S. CONST. art. II, § 1 (vesting executive power of United States in President); see also N.Y. CONST. art. IV, § 3 (governor has power to “expedite all such measure as may be resolved upon by the legislature, and take care that the laws are faithfully executed”).

²⁹ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (declaring that it is “the province and duty of the judicial department to say what the law is”); see also THE FEDERALIST NO. 78 (Alexander Hamilton) (stating “the interpretation of the laws is one proper and peculiar province of the courts”).

³⁰ See U.S. CONST. art. III, §§ 1-2 (establishing and discussing jurisdiction of federal judiciary); *Marbury*, 5 U.S. at 177-80 (explaining judicial review doctrine); see also N.Y. JUD. LAW app., CODE OF JUDICIAL CONDUCT Canon 1 (McKinney 1992) (stating “[a]n independent and honorable judiciary is indispensable to justice in our society”); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (discussing separation of powers and role of judiciary). See generally BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1925) (exploring role of judicial branch in democratic government).

³¹ See Gibeaut, *supra* note 10, at 50 (exploring political response to judges' decisions in particular areas and addressing campaigns of critics to oust judges for unpopular rulings); see also Goshko, *supra* note 6, at A3 (quoting Patrolmen's Benevolent Association representative stating that “[a]s long as there are judges like [federal judge Harold Baer, Jr.], criminals will be running wild” and New York Governor George Pataki as describing New York State Criminal Court Judge Lorin Duckman as “unfit to serve”); Barry Kamins, *Setting the Record Straight in the Friedman Matter*, 38 N.Y. STATE BAR NEWS, Mar./Apr. 1996, at 5 (discussing controversial decision by Kings County Supreme Court Justice David Friedman); Roberta Cooper Ramo, *A.B.A. Members Who Shrug Off Attacks on the Judiciary Endanger Democracy*, A.B.A. J., June 1996, at 8 (addressing one political leader's criticism of several judges' decisions and identifying critic's placement of judges in “judicial hall of shame” as one of distressing attacks on independence of judiciary); Eugene P. Souther, *Taking a Close Look at the Facts in the Baer Decision*, 38 N.Y. STATE BAR NEWS, Mar./Apr. 1996, at 4 (analyzing ‘sharply criticized’ United States District Judge's decision).

³² See *United States v. Bayless*, 921 F. Supp. 211, 212, 217 (S.D.N.Y. 1996) (granting Government's motion to reconsider and reargue, concluding investigative stop of defendant by police was valid, and reversing previous ruling); *United States v. Bayless*, 913 F. Supp.

federal judge was hounded out of office,³³ and in another, a public official threatened to initiate legislative removal proceedings to punish a state judge for an unpopular criminal ruling.³⁴

Make no mistake, these posturings represent a direct and immediate threat to the independence of the judiciary.³⁵ As Yale Law School Professor Robert Gordon recently observed, the current trend "opens a new and dangerous chapter in the time-honored political practice of judge-bashing."³⁶ There is nothing subtle or ambiguous about the aims of the newest breed of judge bashers. They declare as their aim the removal or punishment of those judges whose decisions do not please them or their political adherents. Former District Court Judge Marvin Frankel recently observed that these glib opportunists act as though they had never heard of the Constitution.³⁷ Their rhetoric is all the more

232, 243 (S.D.N.Y. 1996) (suppressing eighty pounds of cocaine and heroin found by police in defendant's car because police lacked "reasonable suspicion" to search vehicle); Rocco Cammarere, *ABA Directs Aim at Bench-Bashing*, N.J. LAWYER, Aug. 12, 1996, at 1 (suggesting political denouncement and pressure led to Judge Baer's reversal of *Bayless* suppression decision); see also Goshko, *supra* note 6, at A3 (reporting 150 congresspersons jointly requested President Clinton to obtain Judge Baer's resignation); *Preserving an Independent Judiciary - And the Right to Criticize It*, 2 N.Y. LITIGATOR 6, Nov. 1996 (hereinafter *Preserving an Independent Judiciary*) (highlighting instances when New York elected officials severely attacked various decisions seeking change in disposition as well as Governor Pataki's threat to remove Bronx County District Attorney Robert Johnson concerning his decision not to seek death penalty).

³³ See sources cited *supra* note 31 (discussing politicians seeking federal judge's resignation and decision reversal); see also David E. Rovella, *Judge Sarokin Decries Criticism of Bench, Quits*, NAT'L L.J., June 17, 1996, at A10 (suggesting that Third Circuit Judge H. Lee Sarokin's resignation, due to political pressure, was unique).

³⁴ See Spencer, *supra* note 6, at 1 (reporting New York State Governor Pataki's request for New York State Supreme Court Justice Lorin Duckman's resignation after controversial bail hearing); see also *Today's News*, N.Y.L.J., Oct. 11, 1996, at 1 (reporting commencement of Judicial Conduct Hearings concerning Judge Lorin Duckman); cf. Gibeaut, *supra* note 10, at 52 (discussing public outrage over Judge Duckman's decision in controversial bail hearing).

³⁵ See *Preserving an Independent Judiciary*, *supra* note 32, at 8-9 (citing New York State Bar Association's Special Committee on Judicial Independence to balance constructive criticism with effective role of judiciary); see also Henry J. Reske, *Political Matters Heat up Judges Conference*, A.B.A. J., June 1996, at 110 (quoting various chief judges of United States Court of Appeals for Second Circuit in their admonition that when judges are threatened with removal or impeachment for rulings "the entire process of orderly resolution of legal disputes is undermined").

³⁶ See Rovella, *supra* note 33, at A10; see also Seymour, *supra* note 20, at 1 (decrying increasing practice of "judge-bashing" by elected officials).

³⁷ See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 104 (1973) (noting that "our elected lawmakers, who are not less than the judges [are] bound by their oaths to support the Constitution"); cf. Harvey A. Silvergate, *American Family Values*, NAT'L L.J., Nov. 13, 1995, at A23 (noting Judge Frankel's popularity for his civilized approach).

alarming because it comes from elected leaders who are sworn to uphold that document.³⁸

From Alexander Hamilton³⁹ theorizing in the *Federalist Papers*,⁴⁰ to Chief Justice Rehnquist⁴¹ addressing a law school audience,⁴² to our own New York State Court of Appeals Chief Judge Judith S. Kaye⁴³ speaking on the state of the judiciary,⁴⁴ to the twenty-six individuals and bar groups participating in a recent

³⁸ See Marvin E. Frankel, *Political Demagoguery Threatens Judiciary*, NAT'L L.J., Apr. 15, 1996 at A1 (suggesting requests by elected officials for Judge Harold Baer, Jr.'s resignation in response to unpopular decision oversteps their authority).

³⁹ See generally 6 THE GUIDE TO AMERICAN LAW 1 (West 1984). Alexander Hamilton (1755-1804) was a lawyer who also represented the State of New York at the Constitutional Convention. *Id.* Hamilton co-authored *The Federalist*, urging adoption of the United States Constitution. *Id.* He served as the first Secretary of the Treasury in 1789 and was killed in 1804 during a duel with Aaron Burr. *Id.*

⁴⁰ See THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Fearing that the legislative or executive branch would impose its will on the judiciary and commingle the power to create or enforce law with the judicial power, Hamilton noted:

It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

Id. at 467.

⁴¹ See WHO'S WHO IN AMERICAN LAW 638 (9th ed. 1996). Chief Justice William Hubbs Rehnquist was born on Oct. 1, 1924 in Milwaukee, Wisconsin. *Id.* He served as law clerk to United States Supreme Court Justice Robert H. Jackson from 1952 to 1953 and engaged in the private practice of law from 1953 to 1969. *Id.* Chief Justice Rehnquist was appointed Assistant Attorney General by President Richard M. Nixon in 1969 and served as Associate Justice of the United States Supreme Court from 1971 to 1986. *Id.* He was sworn in as Chief Justice on September 26, 1986. *Id.*

⁴² See Linda Greenhouse, *Rehnquist Joins Fray of Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A1. Chief Justice Rehnquist responded to heated criticism of United States District Court Judge Harold Baer, Jr.'s refusal to admit evidence and a confession in a recent drug case, and stated that the Senate's refusal to convict Supreme Court Justice Samuel Chase in 1805 still assures federal judges, "that their judicial acts—their rulings from the bench—would not be a basis for removal from office by impeachment and conviction." *Id.*

⁴³ WHO'S WHO IN AMERICAN LAW 400 (9th ed. 1996). New York State Court of Appeals Chief Judge Judith Smith Kaye was appointed to the New York State Court of Appeals in 1983 by Governor Mario M. Cuomo. *Id.*

⁴⁴ See Judith S. Kaye, *The U.S. Constitution: The Original American Dream*, 16 PACE L. REV. 471, 472 (1996). In her discussion on the independence of the judiciary, Chief Judge Kaye stated that an impartial judiciary utilizes reason and principle, and not "privilege, pressure or passion of the moment," as the basis for the resolution of disputes. *Id.*; see also Gary Spencer, *Kaye Warns of Attacks on Courts: Press Coverage Seen Harming "Confidence"*, N.Y.L.J., Apr. 18, 1996, at 1. In her State of the Judiciary message, Chief Judge Judith S. Kaye stated:

The role of the courts as impartial protector of individual rights can provoke controversy, especially in 'hard' cases involving unpopular causes or litigants. Yet it is precisely because independent tribunals decide cases according to the law and not the opinion polls that so many, including vocal critics, immediately turn to the courts for protection and relief when their own important interests are at stake.

Id.

joint statement,⁴⁵ the responsible commentators are unanimous that our free and democratic system of government depends directly on the existence of an independent judiciary.⁴⁶ The judiciary must be free to rule on constitutional matters without fear of removal for failing to swim with the prevailing political current. Those who suggest that judges should rule with an eye toward the opinion polls either misunderstand the fundamentals of our checks and balances system or are guilty of a willingness to abandon that time-proven system in exchange for transitory political gain.⁴⁷ In either event, we lawyers and judges, as well as scholars, historians, and all responsible citizens, have a duty to stand up to these latter-day political bullies lest our fragile experiment in ordered liberty⁴⁸ be torn down.

In the final analysis, those politicians who would beat the "law and order" drum, do their cause no service by maligning or ridiculing the judiciary. The judiciary stands not only as a bulwark against oppression by the majority, but also as a powerful symbol of our society's laws and rules.⁴⁹ The effectiveness of that symbol is diminished every time someone throws mud at a judge because of a particular ruling. We can hardly expect would-be criminal offenders to take the laws seriously when our highest elected officials treat those wearing judicial robes with such cavalier disrespect.⁵⁰

⁴⁵ See Daniel Wise, *Twenty-Six Bar Groups Join to Defend Judiciary*, N.Y.L.J., Mar. 8, 1996, at 1 (pointing out that Joint Committee was formed to preserve independence of judiciary while admonishing politicians for their attacks on this branch).

⁴⁶ See, e.g., Joseph S. Larisa, Jr., *'Meddling' in High Court Noted, Not Approved*, N.Y.L.J., Dec. 21, 1987, at 12 (commenting on Chief Justice Rehnquist's statements concerning presidential and congressional "meddling with court's independence").

⁴⁷ See *Gavel-to-Gavel Politics*, THE NATION, July 1, 1996, at 3 (quoting New York State Judge Burton Roberts responding to New York City Mayor Rudolph Giuliani's criticism of his rulings by stating, "[i]t was not incumbent upon me to poll public officials to interpret the law for me or to guide me on how I should exercise my constitutional responsibilities and judicial discretion").

⁴⁸ See *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937) (declaring that federal constitutional rights are "implicit in the concept of ordered liberty" and thus should apply to states through Fourteenth Amendment).

⁴⁹ See THE FEDERALIST NO. 78, *supra* note 40, at 464. In a republic, the judiciary obstructs possible invasions by the majority on the rights of the minority. *Id.*; see also *Gavel-to-Gavel Politics*, *supra* note 47, at 3. In the context of Judge H. Lee Sarokin's controversial ruling, the article quotes Alexander Hamilton's statement that "[t]he complete independence of the courts of justice is peculiarly essential" to our constitutional system. *Id.* Furthermore, "[o]nly judges can protect individuals from an overreaching state, and minorities from the tyranny of the majority." *Id.*

⁵⁰ See, e.g., Steven Keava, *Hearings Will be Held to Determine Oversight Limits*, A.B.A. J., Oct. 1996, at 110 (arguing that "scape judging" undermines integrity of judiciary and democratic process).

I would like to conclude with the thoughts of my friend and colleague, the Honorable Vincent R. Ballella, who served ably at the Appellate Division, Second Department, and who died a few weeks ago.⁵¹ In remarks made in connection with his receipt of the Normal F. Lent Award from the Nassau County Criminal Courts Bar Association, Justice Ballella said:

The presumption of innocence, the burden of the prosecution to prove the defendant's guilt beyond a reasonable doubt, the defendant's right to remain silent—these are principles emblazoned in our Criminal Justice System Other protections enjoyed by the criminal defendant have developed through a long line of court decisions, often-times in response to overzealous law enforcement officials, all of which has led to the belief by many that the system is now slanted in favor of the criminal [I]n a society which respects the rights of the individual, . . . [w]e seek to protect the innocent The system has evolved so that the INNOCENT can live in peace and quiet without the threat of unbridled police activity However, we cannot protect the INNOCENT without bestowing the same presumption of innocence and all of the other benefits which we expect as citizens . . . on the guilty as well as the innocent If those who criticize the system would think of themselves as being wrongfully accused, they would then understand that we protect the guilty because we must protect the INNOCENT.

There are winds blowing throughout our state and nation calling for changes because [of concerns] about the growth of lawlessness in our society We must be careful that the strong voices clamoring for change do not result in the emasculation of the appropriate protections . . . that have made this country unique⁵²

To Justice Ballella's thoughts I would add one final thought of my own: Let all those who would deprive criminal defendants of their constitutional protections be mindful that anyone may be

⁵¹ See *THE AMERICAN BENCH* 1625 (Laura E. Harris ed., 8th ed. 1995). Vincent R. Ballella, Jr. was an Associate Justice, New York Supreme Court, Appellate Division, Second Department. *Id.* Justice Ballella received his Juris Doctorate from St. John's University School of Law in 1951 and served two terms as a New York State Assemblyman beginning in 1967. *Id.* He was elected to the New York State Supreme Court in 1978 and appointed to the Appellate Division in 1988 by then Governor Mario M. Cuomo. *Id.*

⁵² Hon. Vincent R. Ballella, *Why Protect the Guilty?*, Remarks upon accepting Norman F. Lent Award from the Criminal Courts Bar Association of Nassau County, *reprinted in NASSAU LAWYER*, Sept. 1996, at 1.

found on the wrong side of the law. If the Constitution and laws do not protect the most reviled criminal, you and I are also unprotected.