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If Justice Is for All, Who Are Its Constituents?

Penny White

IF JUSTICE IS FOR ALL, WHO ARE ITS CONSTITUENTS?*

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I have learned from your president that the American Inns of Court is intended to improve legal skills, enhance professionalism and civility, and foster ethics of the bench and bar, thereby promoting new levels of professional excellence. I can think of nothing more essential to those lofty goals than an active commitment to the indispensable principle of justice for all. Tonight I am grateful for the opportunity to talk a few moments about what I see as the challenge to those of you who are actively committed to the principle of equal justice for all.

Being former and forty has put me in touch with a number of fine folks. Most recently I heard from Judge David Lanphier from Nebraska. Judge Lanphier and I have never met but we have a significant serious similarity—we are both unemployed; more specifically, we are both former Supreme Court justices not returned to our benches. We were both short-timers and we were both criticized for not being in touch with our constituents. In Justice Lanphier's case, the *Lincoln Journal Star* quoted the leader of the opposition movement as saying: "Here's a judge who's out of touch, out of contact with his constituents."[1] This pronouncement prompted my secretary, a savvy non-lawyer, to pose this very serious question to me: "Penny, who is a judge's constituent?"

Indeed, who is a judge's constituent; a court's constituent? In a country that boasts of providing "liberty and justice for all," who are justice's constituents?

While Justice Lanphier was being criticized for losing touch with his constituents, a nationally acclaimed ethics professor was explaining my failure simply as: "'[J]udges should consider the broad attitude of the public' in ruling on cases."[2] When I read that assessment in *The Tennessean*, I was at the National Judicial College attempting to act normal and upbeat while

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1. Butch Mabin, *Supreme Court Judge David Lanphier Ousted*, LINCOLN J. STAR, Nov. 6, 1996, at 1B.

2. Kirk Loggins, *Views vary on White aftereffect*, THE TENNESSEAN, Aug. 3, 1996, at 1A [hereinafter Loggins, *Views vary*].

teaching evidence to trial judges. I did not understand the comment, but I attributed that to my unobjective state of mind at the time.

It is now more than five months later. Guess what? I still do not understand it. How can a judge who takes an oath "to administer justice without respect of persons"[3] and absent fear or favor "answer to the citizens,"[4] "share [the public's] anti-crime fervor," and reflect that sentiment in their rulings,[5] or, as required by some appointing authorities, commit in advance to rulings which favor one side of a lawsuit?[6] What kind of justice system is created by attention to public opinion rather than devotion to equal justice? And what about the close cases, in which justice dictates one result while the so-called broad attitude of the public cries out for another? In those cases in which justice is most difficult, yet most important, must the result nonetheless mirror public opinion?

You know the difficulties with requiring judges to rule based on public opinion as well as I do. Whose public opinion? The opinion of the Tennessee Conservative Union or the American Civil Liberties Union?; of the District Attorney General's Conference or the Public Defender's?; of learned, experienced lawyers serving as jurists; or of John or Jane Q. Public?

I have pointed out laboriously in recent speeches and publications the many omissions that would exist in the American system of justice had judges in our country's history been guided by public opinion rather than principles of fairness and justice.[7] For instance, we would have no minority litigants or jurors, no lawyers for the accused, no ramifications for illegal police action, and quite likely, no fair compensation for many victims of illegal behavior.

My conclusion is, with all due respect, that the learned ethics professor is wrong, that judges do not need the results of public opinion polls to rule, and that those who do base decisions on public opinion or attitude rather than on what justice dictates have violated their oath and undermined the promise of equal justice under the law.

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3. TENN. CODE ANN. § 17-1-104 (1996) (oath for judges and chancellors).

4. Harry Moskos, *Judges Should Answer to the Citizens*, KNOXVILLE NEWS SENTINEL, Aug. 18, 1996, at F2.

5. *Judging the judge*, NASHVILLE BANNER, Aug. 2, 1996, at A16.

6. *See* Duren Cheek & Kirk Loggins, *New judges to face death penalty test*, THE TENNESSEAN, July 27, 1996, at 1A; Loggins, *Views vary*, *supra* note 2, at 1A (Tennessee Governor Don Sundquist noted that the other members of the Tennessee Supreme Court "are going to be coming up for a yes-or-no vote, and if I were them I'd be a little worried.").

7. *See* Penny J. White, *It's a Wonderful Life, or Is It? America without Judicial Independence*, 27 U. MEM. L. REV. 1 (1996); Penny J. White, *An America without Judicial Independence*, 80 JUDICATURE 174-77 (1997); Penny J. White, *Judicial Courage & Judicial Independence*, 16 J. NAT'L ASS'N ADMIN. L. JUDGES 161 (1996).

If the growing trend toward eliminating judges whose decisions do not reflect the "right" way of thinking is to be tempered with reason or exposed with education, it is the members of the bar who must provide that reasoning and explanation. Am I suggesting that as lawyers you should not criticize or disagree with a judge's opinion? That instead you must serve as an ambassador for the retention of all judges presently serving on the bench? Of course not. While I do believe that your criticisms should always be fair, pertinent, and properly motivated, a lawyer's legitimate criticism of a judicial decision is not the focus of my message tonight. My message is to those of you who want to be actively committed to the principle of equal justice under law. To you, I suggest that active commitment includes speaking out when criticism is unfair, explaining when information is incomprehensible, and educating at every possible opportunity.

I bring my message primarily, but not exclusively, to members of the bar. Judges are often unable to speak out. Judicial canons prohibit judges from commenting on pending cases[8] and from taking a stance on political issues.[9]

In addressing the opening assembly at the 1996 American Bar Association ("ABA") meeting, Justice John Paul Stevens said:

> Persons who undertake the task of administering justice impartially should not be required—indeed, they should not be permitted— . . . to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument . . . . A campaign promise to be "tough on crime" or to "enforce the death penalty" is evidence of bias that should disqualify [the judge] from sitting in criminal cases.[10]

As lawyers actively committed to justice for all and as defenders of liberty for the least among us, we must stave off the attempts to make judicial decisions subject to public polling. We must also stave off attempts to make judicial elections the grand prize for candidates who claim that their constituents are law and order, regardless of the circumstance. Judges in a democracy can have but one constituency and that constituency is neither male nor female, neither liberal nor conservative. That constituency is equal justice for all.

I believe that we are members of an honorable profession. I believe just as fiercely that with such an honor comes duty. Our public duties are growing more and more immense as we struggle to make our role in preserving fairness better understood and appreciated. But despite the many obligations we already face, none is more important than our obligation to

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8. TENN. SUP. CT. R. 10, CODE OF JUDICIAL CONDUCT Canon 3(a)(6) (1996).
9. TENN. SUP. CT. R. 10, CODE OF JUDICIAL CONDUCT Canon 7(a)(4) (1996).
10. *Justice blasts state election of judges*, TAMPA TRIB., Aug. 4, 1996, at 16.

hamper the further politicalization of the judiciary brought about by pressures to make judges satisfy the desires of the general public—the so-called "constituency." It is an effort which not only undermines the independence of the judiciary and the promise of equal justice under law, but also confuses the role of courts in America and equates them to political positions where currying favor is accepted and sometimes expected.

I am pleased with my road commissioner when the lane behind my house is paved, with my tax assessor when my property taxes do not increase, and with my legislator when state dollars are designated for projects in my end of the state. But we must counter the growing tendency of the public to believe that satisfaction with the judiciary should somehow be similarly gauged. We must help members of the public understand that they should be satisfied with the judge not because the judge agrees with them, but because the judge treats every person who stands before the judge identically while meting out justice with fairness.

As lawyers, I am suggesting that it is incumbent upon us to become, in the words of Martin Luther King, Jr., "drum majors for justice."[11] Dr. King described a drum major for justice as one who speaks the truth no matter how unwelcome it may be or how uncomfortable it may make the listener.[12] I have suggested that good judges—ethical judges—must do exactly that in every opinion they write, every ruling they make, and every decision they render.[13] I suggest that lawyers, law professors, and judges not involved in the particular case must become drum majors for justice if our system of justice is to survive the present efforts to reduce its members to contestants in a tough-man contest.

In that effort, then, to encourage you as leaders of the profession to lead the commentary on our justice system and on those who administer justice, let me give you a few examples. We all remember the case in which federal Judge Harold Baer, Jr. was criticized publicly for a ruling he made suppressing evidence in a drug case in the southern district of New York.[14] After New York politicians Mayor Rudy Gulliani and Governor George Pataki took on Judge Baer, others joined the bandwagon.[15] Speaker Newt Gingrich described the judge as "the perfect reason we are losing our civilization."[16] Eventually, the White House jumped on board. Originally, the President's press secretary announced that the President had put Judge

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11. Martin Luther King, Jr., *A Testament of Hope*, *in* THE ESSENTIAL WRITINGS OF DR. MARTIN LUTHER KING 267 (James M. Washington, ed., 1986).

12. *See id.*

13. *See* articles cited *supra* note 7.

14. United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y.), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996).

15. Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299, 300 (1996).

16. *Id.* at 300.

Baer on notice to reverse or resign.[17] Senator Bob Dole called for the judge's impeachment.[18] But, within this travesty, this frightening saga, arose the sound of the drum majors for justice.

The public clamor by those in power and the eventual reversal by the judge of the ruling makes the faint whistle of the drum majors hard to hear, but they are out there nonetheless. The first drum major, United States Attorney for the Southern District of New York Mary Jo White, decried the politicalization of the case in a letter transmitting a memorandum of law on the motion to reconsider:

> We greatly regret that this case has become a topic of political debate and that there has been so much inappropriate rhetoric surrounding it . . . . The independence of the judiciary is . . . one of the fundamental cornerstones of our government and democracy. It is indeed that independence that both the Government and defendants rely upon in every case for a fair and just decision on the merits.[19]

She did not stand alone.

Unwilling to watch in silence, Judge Baer's colleagues—led by Chief Judge John O. Newman and three prior Chief Judges of the Court of Appeals for the Second Circuit—issued a public statement regarding the attacks on Judge Baer.[20] They noted that:

> The Framers of our Constitution gave federal judges life tenure . . . . They did not provide for resignation or impeachment whenever a judge makes a decision with which elected officials disagree . . . .
>
> We have no quarrel with criticism of any decision rendered by any judge. Informed comment and disagreement from lawyers, academics, and public officials have been hallmarks of the American legal tradition.
>
> But there is an important line between legitimate criticism of a decision, and illegitimate attack upon a judge.[21]

Judge Baer's colleagues further noted that "[these attacks] threaten to weaken the constitutional structure of this nation . . . . [They] do a grave disservice to the principle of an independent judiciary, and, more significantly, mislead the public as to the role of judges in a constitutional democracy."[22]

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17. Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1.

18. Katharine Q. Seelye, *A Get-Tough Message at California's Death Row*, N.Y. TIMES, Mar. 24, 1996, at 29.

19. Pollak, *supra* note 15, at 301.

20. *Id.*; *see* David S. Broder, *Space for a Judge*, WASH. POST, Apr. 14, 1996, at C7; Don Van Natta, Jr., *Judges Defend A Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1, B4.

21. Pollak, *supra* note 15, at 301.

22. Broder, *supra* note 20, at C7.

Judicial drum majors are not unprecedented; witness, for example, the statements of Justice John Paul Stevens at the ABA Convention. However, the political climate is making them much more uncommon and unlikely. Rather than risk being connected with the unpopular viewpoint, many judges choose to remain silent undoubtedly hoping that their colleagues will react differently when it is their ox being gored. Recognizing *that* reality makes the statement of Chief Judge Newman more commendable, albeit not quite as heroic as support from a non-life tenured state court judge would be.

Our search for drum majors for justice is not limited to those who are learned in the law. In fact, many of our best spokespersons are those who are not seen as part of our club. One of the best examples of a drum major for justice was in fact a sixteen-year-old named Lesra Martin. Martin, an African-American youth from Brooklyn, was living in Toronto when he ran across the book, *The 16th Round: From Number 1 Contender to Number 45472*[23] at a Toronto Book Fair.[24] He bought the book for one dollar and learned the story of Rubin "Hurricane" Carter, the number one ranked contender for the middleweight boxing crown in 1966.[25] Carter, also an African-American, was arrested and charged that year with murdering three white people.[26] Along with a companion, he was convicted in New Jersey in 1969 and sentenced to life in prison.[27] Carter maintained his innocence and wrote his story while in prison.[28]

After reading his story, Martin and his friends were convinced of Carter's innocence.[29] They joined with his attorneys and worked four and one-half years investigating the case and providing moral support to Carter.[30] In 1985, five years after Martin bought himself a book he thought was about boxing, and almost twenty years after that boxer was imprisoned for murders he did not commit, Carter was released.[31] Today, as the executive director of the Association in Defense of the Wrongly Convicted, Carter speaks frequently on the importance of the writ of habeas corpus.[32]

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23. Rubin (Hurricane) Carter, THE 16TH ROUND: FROM NUMBER 1 CONTENDER TO NUMBER 45472 (1974).

24. William Nack, *True to His Words*, SPORTS ILLUSTRATED, Apr. 17, 1992, at 83.

25. *Id.* at 83-84.

26. *Id.* at 84.

27. *Id.*

28. *Id.* at 83-84.

29. *Id.* at 84.

30. SAM CHAITON & TERRY SWINTON, LAZARUS AND THE HURRICANE: THE UNTOLD STORY OF THE FREEING OF RUBIN (HURRICANE) CARTER (1991).

31. Nack, *supra* note 24, at 92.

32. *See* Mark Clayton, *Captives of Flawed Justice Systems: As Citizens Demand Tougher Crime Laws and Fewer Restraints on Police, Cases of Wrongful Conviction Point to Unresolved Problems in Law Enforcement*, CHRISTIAN SCI. MONITOR, Mar. 27, 1995, at 9; Michael York, *"Hurricane" Carter Pleads for Rights of Defendants; Lawyers Hear from Celebrated Ex-Boxer*, WASH. POST, Oct. 3, 1993, at B3.

Hurricane Carter is able to speak unshackled because a young man read his story, sensed an injustice, and set about to correct it.

Witness also the work of Sister Helen Prejean, whom the conservative right can hardly label as immoral, who quotes Albert Camus' *Reflections on the Guillotine*[33] as her "moral compass" on capital punishment: "Society proceeds sovereignly to eliminate the evil ones from her midst as if she were virtue itself."[34] I am told that in the most conservative circles her message of a merciful justice is heard and well received. She is a drum major for justice.

Finally, I suggest that political leaders can and should be drum majors for justice. Rather than massaging public anger for political gain, political leaders should encourage respect for the institutions of government. They should accept that very often the public will lump government into one category and dissatisfaction with one branch will breed and foster discontent with another. It is therefore wise, and responsible, to promote confidence and support in the other branches, rather than echoing criticisms and disgust.

Perhaps in today's political atmosphere, examples of political leaders who take up the cause of justice are rare. I can, however, share with you two examples which are so overwhelmingly impressive that they overshadow the fact that more examples do not readily come to mind. The first takes us back thirty-three years when Clarence Earl Gideon, with a handwritten petition for certiorari, caught the attention of the United States Supreme Court by claiming that the Sixth Amendment to the United States Costitution meant what it said—that he had a right to a lawyer in the Florida trial courts before being tried and convicted of a crime.[35] Florida asserted in the Supreme Court that the Sixth Amendment was not so broad, and that Gideon and other indigent defendants had no entitlement to counsel at trial.[36] A young Attorney General from the State of Minnesota, Walter Mondale, led a group of attorneys general from twenty-two states joining as amicus curiae to support Gideon's position.[37]

The second example takes us to South Africa, which today, after decades of struggle, celebrated the enactment of its newly adopted Constitution. The South Africa Constitutional Court struck down a law delegating broad-based powers to President Nelson Mandela's administration.[38] As

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33. Albert Camus, *Reflections on the Guillotine*, *in* RESISTANCE, REBELLION AND DEATH, 225-26 (Justin O'Brien trans., 1974).

34. SISTER HELEN PREJEAN, DEAD MAN WALKING 20 (1993) (quoting Camus, *supra* note 33, at 225).

35. Gideon v. Wainwright, 372 U.S. 335 (1963).

36. *See id.* at 339-40.

37. ANTHONY LEWIS, GIDEON'S TRUMPET 147-48 (1964); Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime" but "Hard on the Bill of Rights,"* 39 ST. LOUIS U. L.J. 479, 496 (1995).

38. Stephen B. Bright, *Politicians on Judges: Fair Criticism or Intimidation?*, 72

soon as the decision was released, President Mandela made a public announcement. His message to the citizens of South Africa: The Constitutional Court of South Africa has spoken. We must now proceed to implement its decision.

How different that response than the ones which we hear all too often calling for impeachments, resignations, or defeat at the polls. We cannot wait for the spirit of fairness evidenced by a Mondale or Mandela to transform our political leaders into drum majors for justice. We must instead assume those leadership roles ourselves.

As lawyers, as judges and as citizens we must seize every opportunity to become drum majors—spokespersons for justice. We must speak out even when our messages are unwelcome; we must say the words that sometimes make our listeners feel uncomfortable.

We must bear witness to the inappropriateness of judges who answer to constituents; who "maintain contact" with their people. We must bear witness to the injustice of such a system. We must force our fellow citizens out of their indifference and away from their ignorance about such a system.

When Justice Thurgood Marshall, a life-long drum major for justice, accepted the Liberty Bell Award in Philadelphia six months before his life came to an end, he was frail, I am told.[39] He was seated at the podium in a wheelchair.[40] But it was observed that by the end of his remarks, "his voice was as booming as [it had been] in those magnificent times when he argued before the Supreme Court."[41] In accepting the award, Justice Marshall confessed that while he wished he could say "that liberty and equality were just around the bend," he could not.[42]

What he could and did say, however, is what I have tried to say tonight, although much less eloquently. And so I will borrow the words of the late Justice Marshall in closing. "We cannot play ostrich. Democracy cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. We must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. . . . We must dissent from the poverty of vision and the absence of moral leadership."[43]

May I also add: We must be drum majors for justice. We must take up the unpopular cause of justice for those who have no lobby, as Attorney

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N.Y.U. L. REV. (forthcoming, May 1997) (focusing on the remarks that the author gave under the same title to the New York City Bar, Oct. 7, 1996).

39. A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1430 (1994).

40. *Id.*

41. *Id.*

42. *Id.* (quoting CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 453 (1993)).

43. *Id.* at 1431 (quoting ROWAN, *supra* note 42, at 454).

General Robert Kennedy described the poor,[44] as well as justice for those who feel they have bought and paid for it. We must drown out the ignorance, the demagoguery, and the notion that justice is contingent upon the desires of an understandably angry but unreasonably uninformed public. We must help the public understand that justice can never depend upon public opinion polls or popularity contests, but must instead have no constituency save equality and fairness. GO AND LEAD THE BAND.

44. LEWIS, *supra* note 37, at 211.