

# Rhode Island Interest

## Culture of Quiescence

Carl T. Bogus\*

### I.

“People ask you for criticism, but they only want praise,” W. Somerset Maugham wrote.<sup>1</sup> Anyone who has ever given or received criticism recognizes the truth of that observation. Yet painful as it may be, criticism is essential. People and their institutions are fallible, missteps are inevitable, and anyone who does well has profited from mistakes. No one learns to ride a bicycle without falling. The learner who tumbles off the bicycle does not need to be told that something went wrong; gravity delivered the message. But when we are dealing with complex matters involving social or institutional relationships, it is often difficult to know when one has lost her sense of balance. As Winston S. Churchill put it: “Criticism may not be agreeable, but it is necessary; it fulfills the same function as pain in the human body, it calls attention to the development of an unhealthy state of things.”<sup>2</sup>

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1. W. SOMERSET MAUGHAM, *OF HUMAN BONDAGE* 241 (PENGUIN BOOKS 1992) (1915).

2. WILLIAM MANCHESTER, *THE LAST LION: WINSTON SPENCER CHURCHILL, VISIONS OF GLORY 1874-1932*, at 348 (1983) (quoting one of Churchill’s earliest speeches in the House of Commons, in which Churchill defended his practice of criticizing his own party).

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People who are overly protected from criticism come to a bad end. Hans Christian Andersen teaches the lesson in his fable of the “Emperor’s New Clothes,” in which a monarch ultimately parades naked because his ministers and courtiers were too timid to tell him that they could not see his imaginary clothes.<sup>3</sup> Similar examples from real life are legion. Some believe that because Saddam Hussein did not tolerate criticism well his advisors were afraid to question his judgments that neither George Bush, father or son, would attack Iraq.<sup>4</sup>

Some people are more vulnerable to a lack of criticism than others, and among the most vulnerable are judges. After all, besides their own staff, which is compromised mostly of secretaries, tipstiffs, and awestruck young men and women fresh out of law school, judges interact most often with the lawyers appearing before them. Saying that lawyers treat the judges with deference fails to capture the interaction; it is more accurate to say that lawyers bow and scrape. Some lawyers have elevated fawning to an art form, pulling it off with subtle elegance. Others are grotesquely obsequious. But few tell a judge she is wrong. There are even developed techniques for avoiding such a calamity. One of my mentors tutored me in how to handle the wholly irrelevant or foolish question from the bench. The skilled advocate never points out the problem with the question, he told me; instead she says “that’s precisely the point, your Honor,” and proceeds quickly on with her argument, as if what the judge said was not only prescient but supported the advocate’s thesis. This struck me as almost cruelly unhelpful to a judge who is trying to sort out the complicated facts or understand counsel’s argument in a new case. But it is conventional wisdom nonetheless.

The result of such treatment on the good men and women who become judges is predictable. When they are first elevated to the bench, newly appointed judges vow to treat parties and lawyers better than they observed them being treated by other judges. They vow to listen carefully and to be patient and courteous. They

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3. See HANS CHRISTIAN ANDERSEN, *THE EMPEROR’S NEW CLOTHES* (Random House 1975).

4. *E.g.*, Arnold Beichman, *Saddam’s Mistake*, WASH. TIMES, April 18, 2003, at A18 (opining that Saddam Hussein miscalculated because his “subordinates would not have dared utter a defeatist word lest they and their families suffer”).

assume their new roles with a sense of dedication and humility. The dedication frequently lasts; the humility is often dissolved by years of unrelenting sycophancy. Treat someone as omniscient long enough and he may come to believe it himself. People who think themselves omniscient become impatient, disdainful, and cantankerous. There is a name for the condition that ultimately sets in – a name that lawyers use privately among themselves but seldom mention publicly. It is “black robe disease.”<sup>5</sup> Lawyers may snicker, but if judges have caught a disease, the lawyers were the vector of the infection.

This essay is not about black robe disease, however. Black robe disease is a universal phenomenon and my concern is about something that may be peculiar to Rhode Island. I have mentioned black robe disease first because one may better understand Rhode Island’s difference by beginning with a baseline problem. My thesis is that there is a strongly enforced taboo within the Rhode Island legal culture against criticizing the state’s governmental institutions, particularly its courts. The targets and enforcers of this taboo are one and the same: lawyers and judges themselves.

I am not sure whether this taboo is unique to Rhode Island. Perhaps it is endemic to states with small legal communities. The legal community with which I am most familiar is that of Philadelphia, where I practiced for eighteen years. I doubt that Rhode Island lawyers are more unctuous to the judges before whom they appear than their brother and sister lawyers in Philadelphia, or that Rhode Island judges are more susceptible to black robe disease than their counterparts in Philadelphia. What I found different between the two legal cultures, however, is the willingness of the Philadelphia bar to speak out collectively and publicly about perceived problems in the administration of justice, whether by the courts or other instruments of government. Whenever there is a serious problem in state or city government, the bar can be counted upon to sound the alarm and lead the reform effort. In some instances, the organized bar – the state or local bar associations - will take on the effort; in others, lawyers will help form ad

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5. I heard this term many times while practicing law in Philadelphia (1973-91). See also Murray Richtel, *The Simpson Trial: A Timid Judge and a Lawless Verdict*, 67 U. COLO. L. REV. 977, 978 (1996). For a further description, see CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS AND THE COMMON LAW 248 (2001).

hoc groups to take on an issue. But lawyers step forward even when they know that their public efforts will not be greeted warmly by judges, mayors, governors, governmental department heads, agency administrators, or legislators.

That is not the case in Rhode Island.

## II.

Shortly after moving from greater Philadelphia to Rhode Island in 1996, I learned that the Rhode Island General Assembly was appropriating to itself more and more control over administrative agencies. In the federal government and most, if not all, other states, legislative control over executive agencies would be considered to violate the constitutional principle of separation of powers, but, as I was stunned to learn, the General Assembly, and later the Rhode Island Supreme Court, claimed that Rhode Island had never adopted the separation of powers. I have written elsewhere about the substance of this issue<sup>6</sup> and will not deal with that here. Suffice it to say that many citizens considered Rhode Island's repudiation of the doctrine of separation of powers to be the state's most important problem and they developed a movement to bring separation of powers to Rhode Island. Ultimately separation of powers became the most visible issue in the state, and the movement supporting it became so strong and wide that the General Assembly was forced, against its own self-interest, to approve a constitutional amendment adopting the doctrine.<sup>7</sup>

When I first got involved, I expected the bar to spearhead the movement. After all, who understood the doctrine of separation of powers better than lawyers, who studied the grand theory of separation of powers in Constitutional Law as well as the nitty gritty of the doctrine in Administrative Law, and who observe daily how things operate on the ground? I wanted to form a Lawyers Committee for Separation of Powers to publish newspaper ads, signed by scores of attorneys, proclaiming the importance of separation of powers within our constitutional structure of government; organize a speakers bureau of lawyers who would speak about the topic

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6. See Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77 (2004).

7. See Liz Anderson, *General Assembly Unanimously Approves Separation of Powers*, Providence J., July 1, 2003, at A1.

before community and school groups; and raise money for the necessary political effort.

My experience led me to believe this would be easy. The legal community with which I was most familiar was Philadelphia's, where, since 1904, lawyers have led an energetic government watchdog group known as the Committee of Seventy, which has never shied away from controversial issues or hesitated to take on the powerful.<sup>8</sup> Moreover, I am not sure I have ever been involved in a cause that did not have a lawyers group advocating on its behalf. Although the Vietnam War predated my admission to the bar, I know that lawyers from Seattle to New York organized groups such as the Lawyers Committee on American Policy towards Vietnam<sup>9</sup> and the Lawyers Committee Against the War.<sup>10</sup> When I became active in the nuclear arms control movement, it was through the Lawyers Alliance for Nuclear Arms Control.<sup>11</sup> With respect to gun control, in which I have long-standing interest, I am aware of gun control organizations established by lawyers in New York,<sup>12</sup> Pennsylvania,<sup>13</sup> Arizona,<sup>14</sup> and California.<sup>15</sup>

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8. According to the Committee of Seventy website, the organization's Chair, all three Vice Chairs, and ten of twelve members of the Executive Committee are lawyers. See <http://www.seventy.org> (last visited Jan. 14, 2004).

9. See *Passages*, SEATTLE TIMES, Oct. 28, 2001, at A29.

10. See James A. Barnes, *Bradley's Starting Lineup*, 31 NAT'L J. 1978 (1999).

11. The organization has been renamed the Lawyers Alliance for World Security. See David L. Wilson, *Washington's Movers and Shakers; Changing the World*, 22 NAT'L J. 2560 (1990).

12. This group, the Lawyers' Committee on Violence, Inc., was established by lawyers from some of New York City's largest firms. See *Lawyers Take Aim at Handgun Violence*, N.Y. TIMES, April 12, 1994, at B2.

13. This group, the Voice of Reason, was formed by a lawyer who was shot by a former client, in collaboration with the trauma surgeon who saved his life. See Jo-Ellen Darling, *A Life on the Mend*, MORNING CALL (Allentown, PA), Oct. 11, 1998, at B1.

14. This group is the Lawyers Committee Against Gun Violence. See *President of Handgun Control Inc. to Hold Press Conference in Phoenix Friday*, U.S. NEWSWIRE, May 18, 1995, available at 1995 WL 6617995.

15. San Francisco lawyers formed this group, the Legal Community Against Violence (LCAV), following a madman's massacre at the Pettit & Martin law firm in 1993. LCAV is an especially successful group, with affiliated lawyer groups in Illinois and Ohio. See Harriet Chiang, *10 Years After*, SAN FRANCISCO CHRON., July 1, 2003, at A1; Legal Community Against Violence website at <http://www.lcav.org> (last visited Jan 11, 2004).

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And there is nothing special about lawyers and these causes. There is a Lawyers' Committee for Refugee and Immigrant Rights in San Antonio,<sup>16</sup> a Lawyers' Committee for Consumer Rights in Columbus, Ohio,<sup>17</sup> a Lawyers' Committee for Better Housing in Chicago,<sup>18</sup> a Lawyers' Committee for Urban Affairs in San Francisco,<sup>19</sup> a Lawyers' Committee Against Domestic Violence in Brooklyn,<sup>20</sup> and more lawyers' committees for civil rights or human rights than I care to count. To fight cutbacks in the child welfare system, lawyers organized a group provocatively called the Colorado Lawyers' Committee Against Governor Roy Romer and Karen Beye (the acting director of social services).<sup>21</sup> Lawyers are among the first to work for the public good however they perceive it, and no one should think that activism is the exclusive province of liberals. Conservatives established the Lawyers' Committee for Better Government in San Francisco,<sup>22</sup> as well as the influential Federalist Society (which, incidentally, was co-founded by a Rhode Island native who was acculturated elsewhere into the legal profession).<sup>23</sup>

In my naiveté, therefore, I expected to rally Rhode Island lawyers to the cause of separation of powers. Because it is a unified bar to which all lawyers must belong, the Rhode Island Bar Association might be an inappropriate vehicle for an organized lawyer effort, but surely, I thought, lawyers would man the ramparts through an ad hoc committee. More experienced hands quickly disabused me of that notion. Rhode Island lawyers would not, in sizable numbers, publicly challenge powerful elements in

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16. See Maria F. Durand, *Mexicans Smarting Under New Vigilance at Border Crossings*, SAN ANTONIO EXPRESS-NEWS, April 13, 1996, at A1.

17. See Kevin Mayhood, *Ban Should Cut 2 Ways, Lawyers Say*, COLUMBUS DISPATCH, Dec. 5, 1997, at C1.

18. See [www.lcbh.org](http://www.lcbh.org) (last visited Jan. 11, 2004).

19. See John King & Cathrerine Bowman, *Brown Turns Political Tables Again*, SAN FRANCISCO CHRONICLE, Jan. 17, 1996 at A1.

20. See Editorial, *Lawyers Offer Program A Way Out for Abused Spouses*, POST-STANDARD (Syracuse, NY), Nov. 23, 1996 at A5.

21. See Carol Kreck, *State Welfare Changes to Aid Foster Children*, DENVER POST, July 7, 1994, at B1.

22. See Kelly Flaherty, *Dan Quayle: Lawyers are the Root of All Social Need*, THE RECORDER, May 20, 1999, at 6.

23. The Federalist Society was co-founded by Steven G. Calabresi. See Terry Carter, *The In Crowd: Conservatives Who Sought Refuge in the Federalist Society Gain Clout*, 87 A.B.A. J., September, 2001 at 47.

the General Assembly or, following the Rhode Island Supreme Court's startling decisions, criticize the court. Nor would they risk alienating clients who benefit from the current system. This was not something on which there was divided opinion; everyone I talked to assured me that lawyers would sit on the sidelines. Lamentably, they were right. It is my one regret about this struggle that while a small number of lawyers were involved in important ways,<sup>24</sup> the bar was never a force in one of the most significant movements in modern Rhode Island history.

### III.

#### A.

In 1986, Professor Alan M. Dershowitz published *Reversal of Fortune*,<sup>25</sup> in which he recounts his successful handling of the appeal of Claus von Bulow's 1982 murder conviction. It is not hard to see why the book infuriated members of the Rhode Island bar and bench. Dershowitz elevates himself (the *Chicago Tribune's* reviewer found the book "self-serving" and "self-aggrandizing"<sup>26</sup>) at the expense of Rhode Island and its judicial system. As he portrays it, to prevail he had to be not only technically brilliant but negotiate his way through an incestuous and corrupt system where all the forces were arrayed against him.<sup>27</sup>

Rhode Island lawyers might understandably find Dershowitz's evidence for the latter proposition inadmissible not only under rules of evidence but under the dictates of fairness as well. Dershowitz makes a few specific criticisms based on his own ex-

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24. The original proponent of the issue was Sheldon Whitehouse, who advocated for separation of powers in the inaugural issue of this journal. See Sheldon Whitehouse, *Appointments by the Legislature Under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled*, 1 ROGER WILLIAMS U.L. REV. 1 (1996). Other lawyers active in the movement include Alan Flink, Nicholas Gorham, Joseph Larisa (in his capacity as the governor's chief of staff), James Marusak, and Kevin McAllister.

25. ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE* (1986). I recommend the movie by the same name, starring Ron Silver as a remarkably humble Alan Dershowitz, Glenn Close as Sunny von Bulow, and Jeremy Irons who won an Academy Award for his portrayal of Claus von Bulow.

26. Jon Anderson, *Grim Tale is Wealth of Orgies*, CHICAGO TRIB., July 22, 1986, at C3.

27. See DERSHOWITZ, *supra* note 25, at 52-54.

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periences,<sup>28</sup> but more often Dershowitz repeats disparaging statements by others that appear to be based on nothing more than gossip and rank speculation. Von Bulow tells Dershowitz that success in Rhode Island courts depends on connections (although von Bulow wants to cover his bets by adding Dershowitz, and thus substance, to a legal team selected principally for its contacts).<sup>29</sup> Von Bulow's lover says, "Rhode Island is the most corrupt state in the nation."<sup>30</sup> At one point in the story, Dershowitz hears rumors that the attorney general's politically powerful relatives might be lobbying supreme court justices to affirm the von Bulow conviction in order to help the attorney general's political career. Are the rumors plausible? Dershowitz straddles the fence. He suggests he was skeptical yet adds, "but this was Rhode Island - a small-town state whose level of political and judicial propriety seemed at least a decade behind Massachusetts."<sup>31</sup>

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28. For example, Dershowitz claims that there were repeated and detailed leaks from the state supreme court about what its decision would be, who would write the decision, and other matters; that the supreme court gave the *Providence Journal* an advance, embargoed copy of its decision without providing a copy to the parties; and that the superior court made several important decisions, including moving the second trial from Newport to Providence, "internally" and without either a request from the parties or allowing the parties to be heard on the issue. Dershowitz, *Reversal of Fortune*, *supra* note 25, at 143-45, 155, 180.

29. *See id.* at 54 (relating von Bulow's own description of what von Bulow called the "Rhode Island Rules of the Game").

30. *See id.* at 215. What is the most corrupt state in the nation? *See* Kevin McDermott, *New State GOP Chief Has Tough Mission*, ST. LOUIS POST-DISPATCH, July 29, 2002, at B1 (quoting the chair of the Illinois Republican Party as stating that Illinois is "viewed as the most corrupt state in America"); *The People Beat*, SAN ANTONIO EXPRESS, June 16, 2002, at J2 (quoting movie director John Sayles as stating that "Florida is right up there with Louisiana and Illinois as the most corrupt state in the Union"); Carrie Budoff, *Curry Claims Lock on Democratic Nod*, HARTFORD COURANT, June 4, 2002, at A1 (quoting a gubernatorial candidate as stating that Connecticut is "the most corrupt state in the nation"); C. Fraser Smith & William F. Zori, Jr., *Governor's New York Fund-Raiser Criticized*, BALTIMORE SUN, Aug. 10, 1996, at 1A (quoting the chair of the Maryland Republican Party as stating that Maryland had "a reputation for being one of the most corrupt states in the country"); Alan Lupo, *Defying Local Wisdom*, BOSTON GLOBE, Feb. 10, 1990, at 23 (declaring that Massachusetts is "the most corrupt state in the union"); Stuart Auerbach, *U.S. Attorney in N.J. Resigns, Assails President*, WASH. POST, Sept. 13, 1977, at A7 (quoting the retiring U.S. Attorney for New Jersey as stating that New Jersey "was universally viewed as one of the most corrupt states, if not the most corrupt state, in the nation").

31. *See* DERSHOWITZ, *supra* note 25, at 154.

The book's general attack on Rhode Island, such as it is, is ineffective. The reader has no reason to believe that von Bulow, his lover, or unnamed gossips know anything about the Rhode Island justice system. Nora Ephron concluded her book review for the *New York Times* by observing that Random House had just thrown a midnight champagne party for Dershowitz and von Bulow at the Palladium Theater in New York City, and remarked, "As for me, I'd rather be in Rhode Island."<sup>32</sup> Therefore, while it is understandable that *Reversal of Fortune* would annoy Rhode Island judges and lawyers who are proud of the professional community to which they belong, the intensity of their reaction seems overwrought, and the means they employed are disturbing.

The best known salvo was fired by Judge Ronald Lagueux, whom President Reagan had just appointed to the United States District Court for the District of Rhode Island, following Lagueux's eighteen years on the bench of Rhode Island Superior Court. In an interview in May of 1986, Judge Lagueux told the *Providence Journal* that because of Dershowitz's "scurrilous" attacks on the Rhode Island judicial system, Lagueux would never allow Dershowitz to practice in Lagueux's courtroom.<sup>33</sup> Boston attorney Harvey A. Silverglate, representing Dershowitz, sent Lagueux a letter asking for the legal basis for banning Dershowitz from appearing in matters before Judge Lagueux and challenging Lagueux to a debate on the matter. Lagueux never replied.

Had that been the end of the story, the episode would have been remembered as a single injudicious lapse. Judge Lagueux's remarks were inappropriate, but people are known to lose their tempers and say things they later regret. But the story resumed in a most unexpected fashion. In a criminal case nearly a year later, Judge Lagueux handed down an opinion denying defendants' motion to dismiss their indictments or, in the alternative, precluding the testimony at trial of a government informant.<sup>34</sup> Counsel for one of the defendants claimed that the informant told his client that the substance of his testimony – that is, whether he would inculpate or exculpate the defendant – depended on whether their

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32. Nora Ephron, *Pulling Victory out of the Black Bag*, N.Y. TIMES, June 15, 1986, Book Review section, at 9.

33. See Robert Safian, *New England Egos on Parade*, AM. LAW., July/Aug. 1989, at 149 (quoting a May 10, 1986 article from the *Providence Journal*).

34. *United States v. Cooper*, 662 F. Supp. 913, 920 (D.R.I. 1987).

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client would pay him \$250,000. Defense counsel persuaded the U.S. Attorney for the District of Massachusetts to wire his client for this conversation, which took place in Boston. The conversation was ambiguous, however. After four days of hearings and oral argument, Judge Lagueux concluded that the informant had not used his testimony as a cudgel to extort money but had instead demanded payment of what the informant considered a pre-existing debt, and done so without offering any quid pro quo.

One would expect that, in this run of the mill motion, the most interesting aspect of the court's opinion would be the reasoning that led Judge Lagueux to credit one interpretation of the conversation over another. But that almost recedes into the background. What blares more loudly is Judge Lagueux's blistering attack on a particular defense counsel, Andrew Good, whom he accused of maliciously setting up the informant. Judge Lagueux argued that Good knew that the informant would demand repayment of a debt, and that Good schemed to predispose the U.S. Attorney to expect that the informant was instead soliciting a bribe and then to mislead the U.S. Attorney and the court into believing that is what occurred.

As it happens, Good was Harvey Silverglate's partner, and Silverglate was involved in helping to persuade the U.S. Attorney to record the conversation. In his written opinion, Judge Lagueux took unexplained personal whacks at Silverglate. At one juncture, Judge Lagueux described Silverglate as "a self-proclaimed expert on greed, who was in on the planning of this bushwhacking;"<sup>35</sup> at another, he wrote that Good devised the plan "with the help of his name-dropping partner, Silverglate."<sup>36</sup> The attacks on Silverglate pale in comparison to those on Good, but they stand out nonetheless because they were personal, cryptic, and gratuitous.

At that stage, Good withdrew and was replaced as counsel for one of the defendants. Attorneys for both defendants then asked Judge Lagueux to recuse himself. In support of that request, one counsel, Norman S. Zalkind, submitted an affidavit in which he stated that he believed that Judge Lagueux's attacks on Good and Silverglate were "influenced by the judge's involvement

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35. *Id.* at 916.

36. *Id.* at 917. Judge Lagueux added that Good and Silverglate "decided that the sting could be accomplished if they involved the United States Attorney's Office to do their dirty work for them." *Id.*

in Professor Dershowitz's criticism of the Rhode Island judicial system" and Silverglate's representation of Dershowitz in the matter.<sup>37</sup> Zalkind argued that despite Good's withdrawal, he feared that "a disqualifying lack of impartiality remains, in that your Honor's obvious hostility extended to all counsel and by implication to the defendants."<sup>38</sup> Finally, in what would become the most significant portion of the affidavit (as well as the most germane for our purposes), Zalkind stated that he found Judge Lagueux's hostility to counsel "a wholly convincing indicator of this court's pervasive and irremediable bias where criticism of members of the Rhode Island bar is concerned in general and in particular, when the issue is raised by Massachusetts attorneys associated in this Court's mind with Prof. Dershowitz's earlier criticism."<sup>39</sup> (Silverglate, Good, and Zalkind are all Massachusetts attorneys. Good and Zalkind were both admitted *pro hac vice*; Silverglate did not appear as counsel in the matter.)

Now, motions asking a judge to disqualify himself are, in my experience anyway, quite rare. In my eighteen years of civil litigation I do not remember filing one. It is an understatement to say they are likely to irk the judge. The judge has an obligation to withdraw from a matter in which his impartiality might reasonably be questioned,<sup>40</sup> and a judge is likely to perceive a motion to compel him to disqualify himself as an accusation that he has failed to meet that obligation.<sup>41</sup> Such motions are, moreover, ex-

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37. *In re Jonathan Cooper*, 821 F.2d 833, 840 (1st Cir. 1987).

38. *Id.*

39. *Id.*

40. 28 U.S.C. § 455(a) (2000).

41. Congress amended the disqualification statute in 1974 to make recusal easier. The rule is not designed to ensure merely an impartial tribunal. It also is designed to promote public confidence in the fairness of the tribunal by requiring a judge to step aside, notwithstanding an actual ability to be impartial, whenever an objective observer might reasonably question the judge's impartiality. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-85 (1988). Leading commentators have stressed that, under this standard, lawyers may request that a judge recuse himself while at the same time acknowledging that the judge is "pure in heart and incorruptible." MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 241 (2d ed. 2002). Yet, human nature being what it is, a judge may still take offense when counsel suggests that the judge, through his own conduct, created the appearance of impartiality. In the case under discussion, the challenge to judicial equanimity was even greater because counsel accused Judge Lagueux of actual bias. Of course, under any scenario, the judge must do her best to

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tremely difficult to win. When alleging bias, as Zalkind did in asking Judge Lagueux to recuse himself, one must demonstrate either that the judicial bias was pervasive and extreme or that the bias stems from an extrajudicial source, that is, from a relationship or events outside of judicial proceedings.<sup>42</sup> The judge is presumed to be impartial; the party seeking disqualification has a “substantial burden” to prove otherwise.<sup>43</sup> And the statutory requirements for requesting disqualification are strictly construed.<sup>44</sup> For example, although the statute provides that when a party files “a timely and sufficient” request the judge against whom the motion is directed “shall proceed no further therein, but another judge shall be assigned to hear such proceeding,”<sup>45</sup> it has nonetheless been held that the original judge has the discretion to determine whether the affidavit supporting the request is legally sufficient and that he need only refer the matter to another judge if he determines that it is sufficient.<sup>46</sup>

Judge Lagueux held a hearing on Zalkind’s recusal motion himself and determined that Zalkind’s affidavit was not suffi-

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put aside feelings of annoyance and pride and rule on the motion as dispassionately and objectively as possible.

42. The Supreme Court has held that, as a general matter, the “extrajudicial source doctrine” is implied within 28 U.S.C. § 455(b)(1), which requires recusal when the judge has a “personal bias or prejudice concerning a party,” because an unfavorable disposition toward a party is not bias or prejudice, as those terms should be understood, if the disposition was derived from the trial itself. *Litkey v. United States*, 510 U.S. 540, 550 (1994). But the Court has also held that there is what some call the “pervasive bias exception” to the general rule. As the Court has explained:

It is wrong in theory, though it may not be too far off the mark as a practical matter, to suggest, as many opinions have, that “extrajudicial source” is the *only* basis for establishing disqualifying bias or prejudice. It is the only *common* basis, but not the exclusive reason a predisposition can be wrongful or inappropriate. A favorable or unfavorable predisposition can also deserve to be characterized as “bias” or “prejudice” because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.

*Id.* at 551.

43. *Bin-Wahad v. Coughlin*, 853 F. Supp. 680, 683 (S.D.N.Y. 1995).

44. *See, e.g., United States v. Occhipinti*, 851 F. Supp. 523, 525 (S.D.N.Y. 1993).

45. 28 U.S.C. § 144 (2000).

46. *See, e.g., Holmes v. NBC/GE*, 925 F. Supp. 198, 201 (S.D.N.Y. 1996).

cient,<sup>47</sup> which was fair enough. And, as was quite to be expected, Judge Lagueux was upset with Zalkind for making the motion. Yet the vehemence of Judge Lagueux's counterattack on Zalkind was stunning. He called Zalkind's affidavit "a scurrilous, scandalous personal attack on the integrity of this Court," declared that it was false and not made in good faith, ordered Zalkind to show cause why he should not be found to have violated the Code of Professional Responsibility and have his pro hac vice admission revoked, threatened him with other sanctions including contempt, and asked the U.S. Attorney to investigate indicting Zalkind for perjury.<sup>48</sup> Stating that Zalkind's affidavit contained falsehoods warranting a perjury investigation was patently absurd. Zalkind's affidavit made it clear that Zalkind inferred that Lagueux's hostility toward counsel was influenced by the Dershowitz affair, and explained why he reached that conclusion. An expression of belief of this kind (and Zalkind expressly and repeatedly used the word *belief*) cannot possibly constitute perjury.<sup>49</sup>

Defendants then petitioned the First Circuit for a writ of mandamus compelling Judge Lagueux to disqualify himself. The First Circuit declined to issue the writ, most significantly because the gist of Zalkind's allegations was that the judge was biased against counsel rather than the parties themselves.<sup>50</sup> The court also seemed to give Judge Lagueux the benefit of the doubt that the Dershowitz affair did not affect his conduct in the case.<sup>51</sup>

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47. *United States v. Cooper*, 669 F. Supp. 38, 39 (D.R.I. 1987).

48. *Id.* at 39.

49. No statement can constitute perjury unless its truth or falsity is susceptible to proof. *See, e.g.*, *United States v. Endo*, 635 F.2d 321, 323 (4th Cir. 1980). In the absence of Zalkind having expressly told someone that he, Zalkind, did not believe that Lagueux was influenced by the Dershowitz affair but that he was going to so aver anyway, there is no way to prove that Zalkind lied about what he believed.

50. *In re Cooper*, 821 F.2d 833, 838 (1st Cir. 1987). The court noted that "occasionally exceptional circumstances do arise where a judge's attitude toward a particular attorney is so hostile that the judge's impartiality toward the client may reasonably be questioned," but held that Judge Lagueux's factual findings in the case as they affected the parties "were not so beyond the pale as to be suggestive of bias." *Id.* at 839.

51. *See id.* at 843-44. At the recusal hearing, Judge Lagueux explained what he meant by his previously cryptic descriptions of Silverglate as a self-proclaimed expert on greed and a name dropper. Judge Lagueux noted that at the hearing on the motion to preclude the informant's testimony, Silverglate testified about his involvement in seeking the assistance, first, of a fed-

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Nonetheless, the court was troubled by what it called Judge Lagueux's "highly charged" reaction to Zalkind's affidavit.<sup>52</sup> The court concluded its opinion with the admonition: "We would expect that both counsel *and court* would strive to behave professionally at trial."<sup>53</sup>

On remand, Judge Lagueux transferred to Chief Judge Francis J. Boyle, who was then the other federal district judge in Rhode Island, the question of whether Zalkind should be adjudged in violation of the Code of Professional Responsibility and to have his *pro hac vice* admission revoked.<sup>54</sup> Judge Lagueux then used his opinion explaining that decision as an opportunity to lash out at Alan Dershowitz—the very person whom Lagueux claimed was not affecting his judgment in the case. Judge Lagueux called Dershowitz "a publicity-seeking law professor and sometime criminal appellate lawyer who had criticized the Rhode Island judicial system in a book, entitled *Reversal of Fortune*,"<sup>55</sup> said that "[i]n an effort to promote the sale of his book" Dershowitz told the media that Rhode Island judges were corrupt,<sup>56</sup> declared that "Dershowitz suffers from a spectacular lack of credibility,"<sup>57</sup> castigated Dershowitz for statements that Dershowitz made in his previous book, *The Best Defense*,<sup>58</sup> and said that Dershowitz's recent criticism of Justice Sandra Day O'Connor showed that Dershowitz "continues to use the technique of making unfounded attacks on

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eral district judge in Boston, and subsequently, of the U.S. Attorney in recording the conversation between defendant and informant. Silverglate testified he had told a DEA agent that the informant was likely to show up for a second meeting because "greed can make people do . . . bizarre" things. Silverglate also testified that he called a particular federal district judge (rather than another judge) because he had a relationship with the judge he called, and that the judge had married Silverglate and his wife. *Id.* at 837 nn.1 & 2. Thus Judge Lagueux tried to show that his dislike for Silverglate originated from the judicial proceeding itself and therefore was not the kind of bias that requires disqualification.

52. *Id.* at 843.

53. *Id.* at 844 (emphasis added).

54. See *United States v. Cooper*, 675 F. Supp. 753 (1987). The disciplinary proceedings were heard by Judge Francis Boyle, who was then the only other federal district judge in Rhode Island.

55. *Id.* at 754.

56. *Id.*

57. *Id.* at 754-55.

58. *Id.* at 754 n.3.

the character of judges who do not agree with his position.”<sup>59</sup> That was not all. Judge Lagueux described Harvey A. Silverglate as “a Dershowitz friend, confidant, former student and disciple;”<sup>60</sup> characterized the letter that Silverglate wrote to him as Dershowitz’s counsel as an “infantile missive;”<sup>61</sup> and said that in preparing his affidavit in support of recusal, Zalkind “was following the Dershowitz style of attacking the judge’s integrity whenever an adverse decision is rendered by a court.”<sup>62</sup>

This is breathtaking. Attorneys defending a serious criminal case allege that Judge Lagueux was so furious with Alan Dershowitz for criticizing the Rhode Island judicial system that he could not successfully keep those feelings partitioned off from his judicial responsibilities. They claim his anger with Dershowitz was transferred to any attorneys whom he perceived to be associated with Dershowitz in any fashion. They claim, further, that his animosity against these attorneys was, in turn, so overwhelming that they interfered with his ability to afford their clients a fair trial. Judge Lagueux is outraged at what he views as an attack on this integrity. He defends himself, in part, by explaining that his indisputable dislike for these attorneys – particularly, Harvey Silverglate – springs not from their association with Dershowitz but from their own remarks<sup>63</sup> and conduct in the case before him. By the skin of his teeth, he escapes being ordered by the First Circuit to disqualify himself – in large part because the court accepts his representations that his judicial judgment has not been influenced by the Dershowitz affair. In light of this background, it is astonishing that immediately upon remand, Judge Lagueux – absolutely unnecessarily, and unrelated to anything before him – brought up Dershowitz all over again, in an opinion that almost seems calculated to demonstrate that the allegations in the motion to disqualify him were right all along.

Judge Lagueux made some additional remarks in open court when he informed the parties of his decision regarding Zalkind. He said the attacks on the Rhode Island judicial system constituted “ethical violations” and “a fraud on the Rhode Island Su-

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59. *Id.* at 756 n.4.

60. *Id.* at 755.

61. *Id.*

62. *Id.* at 756.

63. *See supra* note 49 and accompanying text.

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preme Court.”<sup>64</sup> He then reiterated what he had declared a year earlier: “Alan Dershowitz will not be permitted to practice in my courtroom.”<sup>65</sup> Based on these statements, Professor Dershowitz filed a judicial misconduct complaint against Judge Lagueux with the First Circuit.<sup>66</sup> In response, Judge Lagueux sent the chief judge of the First Circuit a letter, stating that Dershowitz filed the complaint in order to intimidate him in the criminal case then before him. Judge Lagueux went on to state that he would refer the matter to the U.S. Attorney, and that if the U.S. Attorney did not investigate the matter he would appoint a special counsel to do so.<sup>67</sup> The matter concluded with the First Circuit privately reprimanding Judge Lagueux for what the court termed his “glaringly injudicious” conduct.<sup>68</sup>

No one questions that Judge Lagueux is a bright man.<sup>69</sup> Why would he undermine himself this way? With the exception of the statement barring Dershowitz from practicing in “his” courtroom, these were considered remarks that were made in writing, not made in a flash of temper. Moreover, Judge Lagueux had three months to consider the matter after the First Circuit handed down its decision on the recusal issue. I suspect that he wrote what he did because on some level he believed doing so served a purpose. He was willing to sustain a self-inflicted wound for a greater good.<sup>70</sup> He believed, moreover, that others in his legal community would see things the same way.

## B.

Although the criminal case was terminated and the U.S. Attorney urged Chief Judge Boyle to therefore consider the proceed-

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64. See Safian, *supra* note 33, at 151.

65. See *id.*

66. *Id.* at 152.

67. See *id.*

68. See *id.*; David Margolick, *At the Bar: A Glimpse at the Secrets of Penalizing Judges*, N.Y. TIMES, July 14, 1989, at A1; see also John H. Kennedy, *Dershowitz Case Documents Made Public*, BOSTON GLOBE, July 19, 1989, at 18.

69. In two published surveys, lawyers unanimously attested to Judge Lagueux’s high intelligence. See Safian, *supra* note 32, at 150; 1 ALMANAC OF THE FEDERAL JUDICIARY, 71 (First Circuit, Aspen Publishers, 2004).

70. Alan Dershowitz told the press that he believed Judge Lagueux threatened him with an obstruction of justice investigation “to terrorize and frighten other lawyers.” See Safian, *supra* note 32, at 152.

ing against Norman S. Zalkind to be moot, Judge Boyle proceeded nonetheless with a disciplinary hearing. Judge Boyle found that Zalkind filed the motion to disqualify Judge Lagueux solely for the purpose of chastising Judge Lagueux for not believing Zalkind's witnesses (with respect to why Zalkind sought to have the conversation between the informant and his client recorded and whether the informant demanded a bribe). "There could be no other purpose since it is obvious to any sensible analysis that the motion to recuse must fail from the outset," Judge Boyle concluded.<sup>71</sup> He punished Zalkind with a formal and public reprimand.

"It may be that Mr. Zalkind is a disciple of the belief that Rhode Island justice is not of the quality provided elsewhere, but this hardly gives him carte blanche to deprecate a judge without any factual basis," Judge Boyle wrote. "It is simply not sensible to believe that because Judge Lagueux had objected to [Dershowitz's] blunderbuss attack upon the quality of the administration of justice in Rhode Island, he would, thereafter, find the testimony of Mr. Zalkind's witnesses and associates to be incredible,"<sup>72</sup> he continued.

Judge Boyle went on to find that Zalkind's statements constituted facts rather than opinion, and that they were "beyond fanciful imagination" and made with reckless indifference as to their truth, thus violating the proscribed ethical standards.

"Finally," wrote Judge Boyle, "it is this Court's conviction that Mr. Zalkind harbors an acquired but unreasonable and unduly influenced bias concerning the quality of justice in this district."<sup>73</sup>

How did Judge Boyle know what Zalkind believed about the quality of justice being dispensed in Rhode Island? Surely Zalkind did not express such views in open court, before either Judge Lagueux or Judge Boyle. And what was the relevance of Zalkind's beliefs about Rhode Island justice?

As best as I can discern it, Judge Boyle considered Zalkind's beliefs relevant because they explained his motive in seeking Judge Lagueux's disqualification – that is, it was Zalkind's low opinion of Rhode Island judges (federal and state) that caused him

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71. See *Zalkind Reprimanded for Lagueux Attack*, RHODE ISLAND LAWYERS WEEKLY, Feb. 29, 1988, at 1 (quoting extensively Judge Boyle's opinion accompanying the Order and Reprimand).

72. *Id.*

73. *Id.* at 24.

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to believe Judge Lagueux had been improperly influenced by the Dershowitz affair. But there are three problems with this reasoning. First, the analysis is entirely circular. Based on Zalkind's affidavit, Judge Boyle inferred that Zalkind had a low opinion of Rhode Island judges; based on Zalkind's low opinion of Rhode Island judges, Judge Boyle inferred Zalkind's motive in submitting the affidavit. Second, if Zalkind truly believed what Judge Boyle assumed he believed, then Zalkind's affidavit reflected sincerely held views, regardless of whether such views were objectively true. Third, it is simply difficult to keep straight whether Zalkind was punished for what Zalkind did, what Zalkind believed, or what Alan Dershowitz believed.<sup>74</sup>

Zalkind appealed Judge Boyle's reprimand, and on March 31, 1989, the First Circuit reversed.<sup>75</sup> The court wrote:

A motion to recuse a trial judge is inherently offensive to the sitting judge because it requires the moving party to allege and substantiate bias and prejudice – traits contrary to the impartiality expected from a mortal cloaked in judicial robe. Yet the fair administration of justice requires that lawyers challenge a judge's purported impartiality when facts arise which suggest the judge has exhibited bias or prejudice.<sup>76</sup>

The court found that Zalkind had employed the proper procedure for challenging Judge Lagueux's impartiality,<sup>77</sup> that there was no evidence that he had not done so in good faith,<sup>78</sup> and that the decorum of the courtroom had been maintained during the process.<sup>79</sup> The court concluded that “[l]awyers using professional care, circumspection and discretion in exercising that right need not be apprehensive of chastisement or penalties for having the advocative courage to raise such a sensitive issue to assure the cli-

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74. If Judge Boyle did not engage in circular reasoning with respect to Zalkind's affidavit, then how did he presume to know what Zalkind believed? The only possibility that occurs to me is that he confused Zalkind's beliefs with Alan Dershowitz's statements.

75. *United States v. Cooper (In re Zalkind)*, 872 F.2d 1 (1st Cir. 1989).

76. *Id.* at 3-4.

77. *Id.* at 4.

78. *Id.*

79. *Id.* at 3.

ent's right to a fair trial and the integrity of our system for administering justice."<sup>80</sup>

In 1989, the National Association of Criminal Defense Lawyers awarded Norman S. Zalkind its Champion of Liberty Award for his courage in not succumbing to the retaliatory measures by Judges Lagueux and Boyle.<sup>81</sup>

C.

At about the time Judge Lagueux first told the *Providence Journal* that he would not permit Dershowitz to practice in "his" courtroom, Judge Lagueux, together with two other co-sponsors, asked the Harvard Law Association of Rhode Island to adopt a resolution condemning Professor Dershowitz "for his recent statements concerning the Rhode Island Bench and Bar."<sup>82</sup> After discussion, the resolution was adopted by a vote of 25 to 0. The resolution said Dershowitz's statements were "totally uninformed and betray a judgmental recklessness unbecoming a prominent representative of a quality law school."<sup>83</sup> That might be hard to quarrel with. But what is disturbing about the Association's action was that it hinted that then Harvard Law School Dean Vorenberg, to whom the Association sent the resolution, ought to somehow sanction Dershowitz.

One sentence reads: "The Association believes that Professor Dershowitz's conduct reflects adversely on Harvard Law School and its attitude toward the judiciary and the professional responsibility of members of the Bar."<sup>84</sup> The resolution contains two conflated implications. First, it implies that Dershowitz's statements are not merely wrong, ill-considered, or irresponsible but violate Dershowitz's professional responsibilities as a lawyer. Second, it implies that Harvard Law School has a responsibility to protect

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80. *Id.* at 5.

81. Telephone interview with Norman S. Zalkind, Member, Zalkind Rodriguez Lunt & Duncan, LLP (Oct. 8, 2003). *See also* [www.zrld.com/normanmanza.html](http://www.zrld.com/normanmanza.html) (last visited Mar. 5, 2004).

82. *Local Harvard Alums Blast Dershowitz*, RHODE ISLAND LAWYERS WEEKLY, June 2, 1986, at 1 (quoting the resolution). The other co-sponsors were Family Court Chief Judge William R. Goldberg and attorney William F. McMahon. *Id.*

83. *Id.*

84. *Id.*

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“its attitude toward the judiciary” by policing comments by faculty.<sup>85</sup>

In his reply to the Association, Dean Vorenberg said he was unclear about how Professor Dershowitz’s conduct reflected adversely on the law school and he was “particularly puzzled” by the suggestion that “the Law School’s attitude toward the Rhode Island Bench and Bar is involved.”<sup>86</sup> He went on to say that the Harvard Law School tradition,

is that the Law School’s duty to the profession and to society in general is best served by not interfering with the performance by individual faculty members of their duty to the profession and to society according to their own conception of that duty – so long of course as they fulfill their responsibilities to the Law School . . . . Except in the most exceptional circumstances, I believe that neither the Dean nor the faculty should set themselves up as judges of the appropriateness of the activity of individual faculty members. That would disserve the spirit of free inquiry that is the essence of what a law school is all about.<sup>87</sup>

On May 14, 1987 (ten days after Judge Lagueux held a hearing on defendants’ motion to disqualify him in the criminal case), the Association adopted a second resolution.<sup>88</sup> This one stated in part:

WHEREAS, recently Alan Dershowitz a member of the Harvard Law School faculty . . . has seen fit to make a baseless and improper attack upon Judge Lagueux’s personal character and judicial competence as well as to make an unwarranted attack upon the judicial competence of Justice Sandra Day O’Connor of the Supreme

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85. Although the resolution expressly makes neither point, it complains about Dershowitz’s “conduct” which, it suggests, constitutes a violation of his “professional responsibility.” The resolution also vaguely connects professional responsibility not only to Dershowitz but also to Harvard Law School, suggesting, however obliquely, that the school has an obligation to control its “representative.” *See id.*

86. Letter from James Vorenberg, Dean, Harvard Law School, to Joachim A. Weissfeld, Secretary, Harvard Law Association of Rhode Island (June 16, 1986) (copy on file with author).

87. *Id.* at 1-2.

88. Resolution For Adoption by the Harvard Law School Association of Rhode Island (May 14, 1987) (copy on file with author).

Court of the United States, merely because he disagreed with one of her opinions . . . the members of the Harvard Law School Association of Rhode Island reaffirm their confidence in and esteem for Judge Lagueux as an outstanding member of the federal judiciary . . . and express their deep regret and embarrassment that a member of the faculty of the Harvard Law School should stoop to such unwarranted and undeserved ad hominem attacks . . . .<sup>89</sup>

Again, the Association sent the resolution to Dean Vorenberg.<sup>90</sup>

There is certainly nothing wrong with Harvard alumni, or anyone else for that matter, criticizing Alan Dershowitz. The critic is hardly immune from criticism. It would have been not only appropriate but useful for the alumni to challenge the substance of Dershowitz's comments. There were any number of ways they could have done this. They could have taken Dershowitz up on his offer to debate in Rhode Island or at Harvard;<sup>91</sup> they could have rebutted his comments in the op-ed page of the *Providence Journal* or the *Boston Herald* (where Dershowitz had published a col-

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89. *Id.* at 1.

90. Dean Vorenberg apparently knew when he would merely be wasting ink. This time his entire reply read: "Thank you very much for sending me the Rhode Island Harvard Law School Association resolution." Letter from James Vorenberg, Dean, Harvard Law School to Joachim A. Weissfeld, Secretary, Harvard Law Association of Rhode Island (July 8, 1987) (copy on file with author).

Professor Dershowitz, however, did write a reply, which began:

Your "resolution" makes my point about the old boy system of injustice in Rhode Island and the unwillingness – or inability – of the bar to criticize corruption in the judiciary far more eloquently than I have been able to make it. Your pathetic resolution reminds me of those issued by Soviet lawyers fearful of retribution and anxious to please the higher ups.

I find it difficult to believe that any self-respecting lawyers would demean themselves by stooping to the sycophantic behavior which your resolution reflects.

Letter from Alan M. Dershowitz, Professor of Law, Harvard Law School to Joachim A. Weissfeld, Secretary, Harvard Law Association of Rhode Island at 1 (July 14, 1987) (copy on file with author).

91. In his July 14th letter, Dershowitz offered to debate members of the Association either in Rhode Island or before students at Harvard. Letter from Alan Dershowitz to Joachim A. Weissfeld, *supra* note 90, at 1.

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umn criticizing Judge Lagueux and the Rhode Island justice system), the *Rhode Island Bar Journal*, or if making noise in Dershowitz's professional home was one of their goals, in the *Harvard Law Record* or the *Harvard Law Bulletin*. Such an exercise might have burnished the image of Rhode Island's judicial system and demonstrated that Dershowitz's opinions were, as the alumni put it, "totally uninformed." Or, conversely, it might have forced the state's judicial system to confront weaknesses. It may have even done both. One way or the other, however, a healthy debate on the merits would have advanced the cause of justice in Rhode Island.

One would have thought that taking on Dershowitz on the merits is precisely what would have come naturally to a group of lawyers. Evidence, argument, and debate are their bread and butter. The very last thing one might expect from Harvard Law School alumni – who, surely, must appreciate the benefits of freedom of speech and academic freedom – is the suggestion that their alma mater police faculty speech.

Regardless of whether the Harvard alumni wanted to take on Dershowitz, however, their interest in the quality of justice in Rhode Island should have made them consider taking on Judge Lagueux. At the least, they could have privately counseled their fellow member to, putting it colloquially, get a grip. It had to be obvious to all that Judge Lagueux was so enraged by Dershowitz's comments – and then by Zalkind's motion for recusal – that he lost all perspective.

What the Harvard alumni chose to do instead was commend Judge Lagueux during an episode of misuse of his office.<sup>92</sup>

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92. Judge Lagueux misused his judicial office by employing it as an instrument to attempt to punish a citizen (Dershowitz) for comments made outside the presence of the court or any judicial proceeding before him. He made these attacks both from the bench and in court opinions. In so doing, he treated a courtroom of the United States as if it were, as he himself described it, "his courtroom." See *supra* note 65 and accompanying text. When judges use their office to reach out – beyond any case or controversy before them – to assert their personal views or punish citizens for expressing theirs, they threaten the integrity of the judicial system, the rule of law, and constitutional democracy. It is this, and only this, aspect of the episode that I characterize as a misuse of office.

## D.

Judge Lagueux may have been reprimanded by the First Circuit, but the message he received from his own professional community – through the actions of Judge Boyle, the Harvard Law School Association of Rhode Island, and perhaps privately by other members of the Rhode Island bar and bench – was quite different. It would not be a surprise if, at the end of the matter, Judge Lagueux saw himself as a martyred champion of Rhode Island justice, someone who courageously defended the reputation and integrity of Rhode Island courts against a celebrity law professor and insolent out-of-state lawyers.

This has consequences. Consider the following. On September 5, 2001, lawyers representing a defendant insurance company in a tort action filed a motion to disqualify Judge Lagueux from the case.<sup>93</sup> They argued for recusal on two related grounds. First, they alleged that when the action had been filed two months earlier, plaintiff's counsel engaged in judge-shopping to have the matter assigned to Judge Lagueux by improperly designating other cases as "related cases" on the civil cover sheet. While there had been other cases arising out of the same incident that had been handled by Judge Lagueux, those cases had terminated and therefore, defendants argued, could not properly be deemed "related" for the purpose of having the new action assigned specifically to Judge Lagueux rather than subject to the court's random assignment system.<sup>94</sup>

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93. *Obert v. Republic W. Ins. Co.*, 190 F. Supp. 2d 279, 283 (D.R.I. 2002).

94. The court opinions make much of the fact that there were two civil cover sheets. The original sheet, filed together with the complaint, did not list any related cases, and the case was randomly assigned to Judge Mary Lisi. On the next business day plaintiff's counsel filed an amended civil cover sheet identifying the terminated cases as related cases, and the case was therefore reassigned to Judge Lagueux. Instructions on the form state: "Related Cases. This section of the JS-44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases." *Id.* at 287. *See also* Instruction VIII, Civil Cover Sheet (Form JS-44, revised 3/99 and approved by the U.S. Judicial Conference). For reasons that remain a mystery to me, Judges Lagueux and Boyle believed that that defense counsel somehow impugned the integrity of the clerk's office by raising the fact that plaintiff's counsel had filed an amended civil cover sheet. The relevance of plaintiff's counsel going to the trouble of filing an amended cover sheet, and listing terminated cases as re-

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Second, they argued Judge Lagueux's impartiality in the new case could reasonably be questioned because of comments he made during both the prior and new cases. In one of the prior cases, Judge Lagueux told defense counsel that he believed that a pleading was frivolous and warranted sanctions, and promised that "the day of reckoning will come."<sup>95</sup> The case, however, was settled, and sanctions were never imposed. Shortly after the new case was filed, Judge Lagueux held a conference in chambers to discuss plaintiff's motion to restrain defendants from prosecuting a separate action involving the same matter in federal district court in Worcester, Massachusetts.<sup>96</sup> Defense counsel alleged that at that conference Judge Lagueux stated that he would call the district judge in Worcester and tell him to transfer that case to federal district court in Rhode Island.<sup>97</sup> They contend that when one of defendant's attorneys, Roderick MacLeish, Jr. of Boston, attempted to explain to Judge Lagueux why the matter belonged in Worcester, Judge Lagueux refused to listen to him, stating that defendants had made misrepresentations and false statements in the past.<sup>98</sup>

I do not claim that defendant's version of the events were accurate or that, even if they were, Judge Lagueux should have recused himself. What is troubling is not the disposition of the motion but the intemperate manner in which it was considered and, worse, the apparent effort – once again, by both Judge Lagueux and another member of the bench – to retaliate against counsel for making the motion.

Judge Lagueux declared that the affidavit of defense counsel "is filled with misrepresentations, half-truths and outright false-

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lated cases is that it evidences his desire to have the case assigned to Judge Lagueux.

95. Memorandum of Law in Support of Motion of Defendant Republic Western Insurance Company to Disqualify Judge Pursuant to 28 U.S.C. § 445, or, in the Alternative, to Transfer to Judge Lisi at 3, *Obert v. Republic Western Ins. Co.* (D.R.I., Civil Action No. 01-324L) (quoting transcript from May 25, 2000 proceeding in the prior case).

96. It appears that on the very same day (July 3, 2001) Republic Western instituted an action in federal district court in Worcester, Massachusetts, and Obert instituted an action against Republic Western in federal district court in Providence, Rhode Island. *See id.* at 4.

97. Affidavit of Annapoorni R. Sankaran at 11, *Obert v. Republic W. Ins. Co.* (D.R.I., Civil Action No. 01-324L).

98. *Id.* ¶ 14.

hoods.”<sup>99</sup> Yet it would be difficult for the dispassionate observer, comparing Judge Lagueux’s own version of the events with those of defense counsel, to characterize either account that way.

For example, Judge Lagueux states:

[T]he affidavit of Ms. Sankaran [one of defense counsel] is filled with misrepresentations, half-truths and outright falsehoods. This Judge has a duty to scrutinize the accuracy of the motion and affidavit and to determine the credibility of the testimony. The parts of the affidavit where Ms. Sankaran refers to the conference as a “hearing” are false. She herself states in the affidavit that “the hearing on Obert’s motion for a temporary restraining order was not held in Judge Lagueux’s courtroom, but rather in Judge Lagueux’s chambers without a stenographer.” This was an attempt to cast aspersions on the Court. That attempt fails. It was an in-chambers conference and conducted in the manner that all in-chambers conferences are conducted.<sup>100</sup>

Judge Lagueux and Ms. Sankaran agree entirely on how this proceeding was conducted, that is, it was a discussion between the judge and counsel in the judge’s chambers. The main relevance of the form of the proceeding is that a court reporter was not in attendance; therefore, a transcript is not available and defense counsel can only set forth their recollection of the discussion. It is true that informal meetings in chambers are generally called conferences, but no one could fairly be accused of a falsehood for calling the proceeding a “hearing” or a “conference.” That is, at most, a characterization of the proceeding, not a statement of fact.

What offended Judge Lagueux about Ms. Sankaran referring to the proceeding as a hearing? Conferences generally deal with procedural and housekeeping matters;<sup>101</sup> they are, as one leading treatise puts it, management tools.<sup>102</sup> Because of the special nature of temporary restraining orders, it was appropriate for Judge Lagueux to decide that motion during an off-the-record confer-

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99. *Obert v. Republic W. Ins. Co.*, 190 F. Supp. 2d at 296.

100. *Id.* (citations omitted).

101. The purposes of pretrial conferences are listed in Rule 16 of the Civil Rules of Civil Procedure.

102. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 428 (2d ed. 1993).

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ence.<sup>103</sup> And it was appropriate for him to discuss with counsel procedural mechanisms for deciding where the dispute should be litigated.<sup>104</sup> But it would not have been fair – only six days after plaintiff filed his motion and before defendant had an adequate opportunity to study, brief, and argue the issue – for Judge Lagueux to make up his mind, not merely on the pending motion, but on the permanent issue of venue. Yet, arguably, that is what he did. According to Judge Lagueux himself, he not only declared that both cases “belonged in Rhode Island for valid legal reasons” but authorized plaintiff’s counsel to communicate his view to Judge Nathaniel Gordon, the federal district judge in Worcester.<sup>105</sup>

Judge Lagueux would have jumped the gun at this juncture by reaching a conclusion about venue, regardless of whether he did so at an on-the-record hearing or an off-the-record conference. I suspect defense counsel’s use of the word “hearing” got under Judge Lagueux’s skin because, in his mind, it emphasized that he had not confined himself to business typically conducted at conferences. Judge Lagueux wrote that the “purpose of the conference was to obtain input from the parties about the present action and the mirror action pending in the District of Massachusetts.”<sup>106</sup>

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103. At the conference, Judge Lagueux decided not to grant the request for a temporary restraining order and to hold the request for a preliminary injunction in abeyance pending Judge Gorton’s decision on a pending motion to dismiss the case before him for improper venue or, in the alternative, to transfer it to the District of Rhode Island. Because of their emergency nature and short duration, temporary restraining orders may be determined solely on the basis of the requesting party’s affidavit or verified complaint. FED. R. CIV. P. 65(b).

104. It was appropriate for Judge Lagueux to decide to wait for Judge Gordon to rule on the venue motion before him, thereby avoiding the prospect of both judges simultaneously reaching conflicting venue decisions. But Judge Lagueux’s decision to tell Judge Gorton that he believed both cases belonged in Rhode Island is another matter. I put aside the question of whether it was appropriate for Judge Lagueux to relay his view of the venue issue to Judge Gorton at all, whether via phone call, plaintiff’s brief, or any other manner.

105. *Obert v. Republic W. Ins. Co.*, 190 F. Supp.2d 279, 296 (D.R.I. 2002).

106. *Id.* at 294. Judge Lagueux also stated: “Semantics aside, the only issue before the Court was whether a temporary restraining order should issue to prevent Republic Western from prosecuting the action in Massachusetts because of the devious conduct of its counsel.” *Id.* at 293. Although he was upset that plaintiff’s counsel “did not confine his remarks to the purpose of the conference,” *Id.* at 294, Judge Lagueux himself moved beyond this limited purpose. *Id.*

But, in fact, he did more than obtain input. When judges schedule a proceeding for the purpose of hearing evidence and argument and deciding an issue, they typically hold hearings, not conferences. That is why he believed defense counsel “cast aspersions on the Court”<sup>107</sup> by describing the proceeding as a hearing rather than a conference.

In her affidavit, defense counsel stated: “Judge Lagueux stated that he was going to call Judge Gordon on the telephone and tell him to transfer the case.”<sup>108</sup> Judge Lagueux characterizes this statement too as a falsehood.<sup>109</sup> Here is Judge Lagueux’s version of what occurred: “I told him in no uncertain words that I could telephone Judge Gordon and state those views directly to him but rather would leave it to Mr. Wistow [plaintiff’s counsel] to convey the message in an official brief (which Mr. Wistow has done).”<sup>110</sup> As anyone who has been a judge for many years must realize, sincere people often have differing recollections of events. Judge Lagueux must frequently hear witnesses describe the same conversation differently without concluding that one of the witnesses must be lying. The only difference here is that Judge Lagueux was himself one of the witnesses. As a judge, he should have been sensitive to the fact that because he remembered the discussion one way would not mean that others could not genuinely have different recollections. This was a long and stressful conference. No two participants could possibly remember it all exactly the same way.

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As it turned out, Judge Lagueux apparently wound up hearing only plaintiff’s counsel on the issue of venue. He writes that “Mr. Wistow presented his position that this Court should be the forum for all litigation in this matter.” *Id.* According to defense counsel, Mr. Wistow’s presentation took twenty minutes. Affidavit of Annapoorni R. Sankaran, *supra* note 96, ¶ 11. When Mr. MacLeish attempted to reply, Judge Lagueux said he told Mr. MacLeish “there was really nothing to address since the Court had decided not to issue a T.R.O. and defer hearing on preliminary injunction . . . . He, nevertheless, persisted. He was insolent and obviously trying to bait the Court.” *Obert*, 190 F. Supp.2d at 294.

As Judge Lagueux moved beyond the pending motions to the question of venue itself, one can understand why Mr. MacLeish wanted to be heard on that issue. Judge Lagueux states, however, that despite repeated warnings Mr. MacLeish attempted to address the merits of the underlying dispute.

107. *Obert*, 190 F. Supp.2d at 296.

108. Affidavit of Annapoorni R. Sankaran, *supra* note 97, ¶ 11.

109. *Obert*, 190 F. Supp.2d at 296.

110. *Id.* at 295.

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By no means do I question Judge Lagueux's right to decide the facts of what actually was said, but how could he, and later Magistrate Hagopian, possibly conclude that defense counsel were lying rather than simply mistaken?<sup>111</sup>

Judge Lagueux denied the motion for disqualification,<sup>112</sup> and in an unpublished, one paragraph per curiam opinion the First Circuit declined to review that decision on an interlocutory basis.<sup>113</sup> Judge Lagueux also ordered the three lawyers from Boston to show cause why their pro hac vice admissions should not be revoked, and he invited plaintiff's counsel to request sanctions against all defense counsel (including two local counsel) for filing a "a motion to disqualify that was not well founded in fact or in law."<sup>114</sup>

A hearing on both issues was held before U.S. Magistrate Judge Jacob Hagopian. "In this case," Magistrate Hagopian wrote, "attorneys for Republic Western Insurance Company . . . attempted to make something out of nothing in a deliberate attempt to judge-shop, plain and simple. They misrepresented facts, made baseless unsupportable arguments and wasted the time and resources of the Court."<sup>115</sup> He found that Sankaran violated the Rules of Professional Conduct and should have her pro hac vice admission revoked, that MacLeish should attend ethics class

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111. Judge Lagueux explained: "The Court credits the affidavits of Mr. Wistow and Mr. Polacek [apparently in every respect] because those affidavits comport with this Judge's recollection of the events that occurred during the August 9, 2001 conference." *Id.* at 293.

Why would defense counsel deliberately mischaracterize a conference as a hearing or distort what Judge Lagueux said about calling Judge Gorton? There was little, if any, advantage to be gained. Whether Judge Lagueux's conduct at the proceeding evidenced a lack of impartiality is unaffected by whether it is labeled a conference or a hearing. And if it was inappropriate for Judge Lagueux to make up his mind about venue and communicate his view to Judge Gorton, it was inappropriate regardless of the means of communication. Moreover, defense counsel would not have expected their version of the facts to prevail if they knew both plaintiff's counsel and the judge knew it to be erroneous. Judge Lagueux and Magistrate Hagopian both ignore the question of motive.

112. *Obert*, 190 F. Supp. 2d at 281.

113. *In re Republic W. Ins. Co.*, No. 02-1476 (1st Cir. May 15, 2002) (denying defendant's petition for a writ of mandamus to compel Judge Lagueux to recuse himself but stating that Republic Western was free to challenge the disqualification ruling in an appeal at the end of the case).

114. *Obert*, 190 F. Supp. 2d at 300.

115. *Obert v. Republic W. Ins. Co.*, 264 F. Supp. 2d 106, 112 (D.R.I. 2003).

sponsored by his local bar association,<sup>116</sup> and that all five attorneys and their law firms should pay sanctions totaling \$31,331.25, representing plaintiff's reasonable expenses in opposing the motion to disqualify.<sup>117</sup>

The admonition that the First Circuit provided in the Zalkind case that lawyers should not have to "be apprehensive of chastisement or penalties for having the advocative courage to raise such a sensitive issue"<sup>118</sup> as recusal has not been heeded.

E.

On October 17, 2003, in the midst of a high visibility civil jury trial involving a black, off-duty police officer who was mistakenly shot and killed by two white police officers, Judge Mary M. Lisi of the federal district court in Rhode Island revoked the pro hac vice admission of New York lawyers Barry C. Scheck and Nick Brustin and declared that she would pursue sanctions against them and plaintiff's local counsel, Robert B. Mann, at the conclusion of the case.<sup>119</sup> What provoked her ire was that she believed the lawyers made "false assertions" about her own conduct in the case.<sup>120</sup>

In order to resolve a dispute about whether they could use a diagram in opening argument, Scheck and Brustin entered into a stipulation with opposing counsel about the location of an automobile depicted on the diagram. Later they requested permission

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116. *Id.* at 123. MacLeish received this additional sanction because he was, in the words of Magistrate Hagopian, a "Rule 11 recidivist," having been sanctioned fourteen years earlier by a federal district court in Florida for filing an amended complaint without "carefully reading and following the court's directives" that the pleading clearly set forth (1) whether each member of a town council and zoning board was being sued in an official or individual capacity, and (2) what administrative activities, as opposed to legislative activities, each defendant had engaged in. *See DeSisto College, Inc. v. Line*, 888 F.2d 755, 761, 763 (11th Cir. 1989).

117. *Obert*, 264 F. Supp. 2d at 112.

118. *United States v. Cooper (In re Zalkind)*, 872 F.2d 1, 5 (1st Cir. 1989). *See supra* note 75 and accompanying text.

119. *See* Edward Fitzpatrick, *Judge Throws Scheck Off Young Suit Against City*, PROVIDENCE J., Oct. 18, 2003, at A1. Judge Lisi also said to them: "Let me suggest to the both of you, don't ever come back on one of my cases." *Id.* at A9. *See also* Edward Fitzpatrick, *Lawyer Agues for Mistrial*, PROVIDENCE J., Oct. 24, 2003, at A1; Tracy Breton, *Judge Lisi Likes to Keep Lawyers in Line*, PROVIDENCE SUNDAY J., Oct. 26, 2003, at A1.

120. *See* Edward Fitzpatrick, *Judge Throws Scheck Off Young Suit Against City*, PROVIDENCE J., OCT. 18, 2003, at A1. (quoting Judge Lisi).

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to be relieved of the stipulation, arguing that the evidence at trial showed the automobile had not been located where they had stipulated it had been. One sentence in their memorandum supporting the motion reads: "Plaintiff, moments before her opening, was informed by the court she had to agree to defendant's stipulation."<sup>121</sup> In context, it was clear that what they meant was that Judge Lisi would not let them use the diagram in opening argument unless both sides resolved the dispute over the location of the automobile. Scheck and Brustin felt they had faced a Hobson's choice: stipulate to the location of the car or do without the diagram in opening statement. Scheck prepared an opening that relied on the diagram and was flummoxed about how to revise it at the last moment. Scheck and Brustin also said they had been genuinely confused about the location of the car and relied on defendant's assertion about its location.<sup>122</sup> They took care to point out that they were not questioning opposing counsel's good faith.<sup>123</sup> But now that evidence showed the car was somewhere else, they requested to be relieved from the stipulation.

Their request was far from frivolous and their memorandum, read in its entirety, was not disrespectful. Nevertheless, Judge Lisi took offense at the literal meaning of the sentence quoted above, that says Judge Lisi told counsel they had to agree to the stipulation. "Your honor, I apologize," Scheck said in open court. "You did not order us to go ahead with this stipulation."<sup>124</sup> But Judge Lisi would have none of it. She revoked their admissions, forcing local counsel to take over in mid-stream, and vowed to pursue sanctions at the end of the case against all attorneys – Scheck, Brustin, and Mann – who signed the memorandum.

Because it occurred in a high profile case, Lisi's action provoked public reactions. Professor Alan M. Dershowitz upset the local bar once again by noting that Zalkind, Silverglate, Scheck and Brustin are all Jewish (as is Rhode Island lawyer Robert Mann) and stating: "The fact that all of these out-of-state lawyers – so

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121. Plaintiff's Memorandum in Support of Motion Requesting to be Relieved from the Stipulation Regarding Exhibit 8, at 1, in *Young v. City of Providence* (U.S.D.C., R.I., C.A. No. 01-288ML).

122. *Id.* at 1, 4.

123. *Id.* at 2.

124. Edward Fitzpatrick, *Judge Throws Scheck off Young Suit Against City*, PROVIDENCE J., Oct. 18, 2003, at A1. (quoting Scheck).

many of whom are Jewish – tend to get thrown off cases raises very, very significant prima facie evidence of bigotry.”<sup>125</sup> The Rhode Island Bar Association held a press conference to condemn Dershowitz’s remark, and Sheck, Brustin and Mann released a letter to the press in which they too denounced Dershowitz’s raising the possibility of anti-Semitism playing a role in Judge Lisi’s action.<sup>126</sup>

The *Providence Journal* published three op-ed articles regarding the Rhode Island federal district court’s history of revoking pro hac vice admissions by out-of-state lawyers. One was written by a United Methodist Minister, and frequent court watcher, who argued that the pro hac vice revocations reflected a tradition of protecting the state’s “closed shop.”<sup>127</sup> Another was written by the administrator of the Rhode Island state courts, who maintained that the courts were treating out-of-state and Rhode Island lawyers alike and suggested that out-of-state lawyers were failing to live up to the Rhode Island standard of practice.<sup>128</sup> The third and most surprising op-ed was written by the chief judge of the federal district court in Rhode Island, who suggested that out-of-state lawyers were running into trouble in Rhode Island because they came from more rough and tumble legal cultures and were not accustomed to the more civil atmosphere in the Rhode Island courts and also decried the suggestions that Judge Lisi’s decisions may have been motivated by racial or religious prejudice.<sup>129</sup>

The American Civil Liberties Union of Rhode Island (ACLU) and the Rhode Island Bar Association (RIBA) requested permis-

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125. Edward Fitzpatrick, *The Young Case Takes Another Turn*, PROVIDENCE J., Nov. 16, 2003, at A1.

126. Edward Fitzpatrick, *Bar Association Defends Lisi*, PROVIDENCE J., Nov. 25, 2003, at A1. I personally know none of the four members of the federal bench discussed in this article, but as someone who was raised Jewish in the area I believe it unlikely that anti-Semitism has been a factor.

127. Anne Grant, *R.I.’s Quintessential Closed Shop*, PROVIDENCE J., Nov. 7, 2003, at B4.

128. Thomas Bowman, *In Defense of the Rhode Island Judiciary*, PROVIDENCE J., Nov. 16, 2003, at D8 (“Out-of-state lawyers who practice before our courts are treated in the same manner as if they were licensed in Rhode Island. This means that they are expected to follow the same rules, know the same Rhode Island law, and adhere to the same code of ethical conduct as Rhode Island lawyers.”).

129. Ernest C. Torres, *In Defense of Judge Lisi in Young Case*, PROVIDENCE J., Nov. 27, 2003, at C6.

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sion to file amicus curiae briefs regarding Judge Lisi's proposed sanctioning of the attorneys. Without explanation, Judge Lisi made the peculiar decision to accept a brief from the RIBA but not from the ACLU.<sup>130</sup> One of my colleagues publicly speculated that Judge Lisi wanted to hear only agreement with her actions and expected, from comments their representatives had already made to the press, that the ACLU would argue that sanctioning the lawyers was unwarranted while the RIBA would take the opposite position.<sup>131</sup> A slightly different explanation may be that the RIBA has had a history of defending the courts from criticism while the ACLU has been a frequent critic of the courts, so that, having been acculturated in the culture of quiescence, Judge Lisi views the Bar Association as a responsible organization and the ACLU as irresponsible.

If Judge Lisi expected the RIBA to come to her defense, she had to be disappointed. The RIBA filed a brief that, despite going to pains to expressly take no position on whether the lawyers made a misrepresentation, nevertheless left little doubt that the RIBA thought they had not.<sup>132</sup> The RIBA argued that sanctions ought to be imposed for conduct that is qualitatively akin to contempt of court and that evidences conscious bad faith,<sup>133</sup> that briefs filed during the pressure of an ongoing trial are necessarily prepared hastily,<sup>134</sup> and that it is important for the court to consider plaintiff's memorandum as a whole and cautioned the court against construing individual sentences separately or out of con-

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130. Edward Fitzpatrick, *Lisi Rejects ACLU Brief on Young Attorneys*, PROVIDENCE J., Dec. 4, 2003, at B1 (reporting Judge Lisi denied the ACLU request without explanation); Edward Fitzpatrick, *Young's Lawyers Before Lisi*, PROVIDENCE J., Dec. 4, 2003, at A1 (reporting Judge Lisi granted the Rhode Island Bar Association's request).

131. Edward Fitzpatrick, *Young's Lawyers Before Lisi*, PROVIDENCE J., Dec. 16, 2003 at A1 (quoting Professor Andrew Horwitz of the Roger Williams University School of Law, who is a past chairman of the Rhode Island ACLU, as saying the disparity in Judge Lisi's decisions "suggests she is only hearing certain voices. Of course, the bar association held a press conference that one could interpret as a defense of her, and then their brief gets accepted.").

132. See Rhode Island Bar Association's Memorandum as *Amicus Curiae* at 1 n.2, 10, 11, & 13, *Young v. City of Providence* (C.A. No. 01-288ML) (expressly stating that RIBA takes no position on whether a Rule 11 violation occurred in the circumstances of the case or, if it did, what the appropriate sanction ought to be).

133. *Id.* at 3-6.

134. *Id.* at 6-8.

text.<sup>135</sup> Even with its careful avowal that it was not taking a position on the substantive issues, within a culture of quiescence, the RIBA's action in filing this brief was bold, and both the Association and, especially, the lawyer who took responsibility for the brief, Lauren E. Jones, deserve credit. At the same time, however, it is important to observe that none of the members of the legal community who were so quick to denounce Professor Dershowitz for his diagnosis of anti-Semitism offered an alternative diagnosis – or even acknowledged the existence of a malady.

Ultimately, Judge Lisi found that Scheck, Brustin and Mann had all violated their responsibility under Rule 11 of the Federal Rules of Civil Procedure by making a misrepresentation to the court.<sup>136</sup> This time, a federal district judge in Rhode Island overreacted not to something as personally difficult as a recusal motion but to the mildest of criticism, if criticism it was at all. This hypersensitivity to criticism blinded her to both the law<sup>137</sup> and the case before her. Regardless of how the case came out, it was important for the parties and the community as a whole to believe there had been a fair trial. But following other worrisome aspects of the trial,<sup>138</sup> ejecting plaintiff's lead attorneys in the midst of a

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135. *Id.* at 8-10.

136. Memorandum and Order, *Young v. City of Providence*, C.A. No. 01-288ML (Feb. 11, 2004). See also Edward Fitzpatrick, *Judge Lisi Censures N.Y. Lawyer Scheck in Leisa Young Case*, PROVIDENCE J., Feb. 12, 2004, at B4.

137. Judge Lisi believed that the lawyers who signed the memorandum committed a Rule 11 violation by making a representation in bad faith, namely, that she had pressured them into signing the stipulation. However, the rule states: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. CIV. P. 11. With a panoply of other sanctions available, terminating a lead lawyer's participation in an ongoing jury trial violates the rule's admonition.

138. Plaintiff's lead trial lawyer was originally to be California lawyer Johnnie L. Cochran, Jr. In a conference call on August 6, 2003, Judge Lisi informed counsel that the trial would begin on October 7. Cochran told the court he had a long planned vacation in Italy during that time and asked for a delay of trial until October 20. Although Cochran made his request two months in advance and asked for only a two week delay, Judge Lisi (irritated, among other things, that Cochran referred to his time away as a "sabbatical" rather than a vacation) denied the request. See Edward Fitzpatrick, *After Scheck's Dismissal from Case, Might Johnnie Cochran Return?*, PROVIDENCE J., Oct. 25, 2003, at A7. Thus, Judge Lisi looked as if she had deprived plaintiff of both her original and substitute choices of counsel. Further compromis-

jury trial weakened the community's faith in the fairness of trial and the tribunal.

#### IV.

##### A.

On April 4, 2003, I published an op-ed article in the *Providence Journal* about the battle for separation of powers in Rhode Island.<sup>139</sup> One portion of that piece reads:

[T]he General Assembly argued that Rhode Island never adopted the principle of separation of powers. Counsel for the House told the state Supreme Court that "under our constitution, the judiciary and legislative departments are independent and coequal branches of government" but the "diminutive" executive branch did not share the same status. The court agreed.

Not content with an unholy alliance between the legislature and the judiciary to preserve their own status and diminish the executive's, the people launched this effort to amend the state's constitution. They have, in no uncertain terms, demanded the traditional American form of government, balanced on three legs.

Shortly thereafter, I received a letter from Chief Justice Frank J. Williams, which reads nearly entirely<sup>140</sup> as follows:

Dear Professor Bogus:

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ing the court's image was the unfortunate selection of an all-white jury in a case directly involving race. Those knowledgeable about the court system may recognize that, in light of the state's demographics, this is neither unusual nor nefarious; nevertheless, it created a challenge for projecting the appearance of fairness. *See* Gerald M. Carbone, *All-White Jury Draws Heat*, PROVIDENCE J., Oct. 12, 2003, at A1 (reporting the composition of the jury, the selection procedure, the state's racial demographics, and quoting a leader of the African-American community as saying, "With an all-white jury, there is no trust").

139. Carl T. Bogus, *Separation-of-Powers End Game: House Must Enact Real Reform*, PROVIDENCE J., April 4, 2003, at B7.

140. I have omitted one paragraph discussing testimony that the executive director of Common Cause of Rhode Island gave to the state House Judiciary Committee about pending separation of powers bills.

While I appreciated your op-ed piece in the April 4th *Providence Journal*, I found your comment suggesting “an unholy alliance between the legislature and the judiciary” to be gratuitous and destructive.

Certainly, I understand that the separation of powers issue is a complex one and that even scholars of the Rhode Island constitution may disagree on its interpretation. I welcome honest and thoughtful debate on the issue; however your comments do not serve to further the discussion. Rather, your comments suggesting sinister intent lack civility and contribute to needless distrust and cynicism among citizens of our judiciary.

You must know that those of us serving in an independent judiciary strive to do so with honor worthy of the public trust. I can assure you the Supreme Court seeks truth and justice not political alliances. For you to suggest otherwise impugns the character and integrity of the members of the Supreme Court that considered the separation of powers issue.<sup>141</sup>

The Chief Justice sent copies of the letter to all sitting members of the state supreme court; Francis X. Flaherty, whose nomination to the court had just been confirmed but who had not yet taken his seat; and Bruce I. Kogan, who was then serving as interim dean of the Roger Williams University School of Law.

I replied as follows:

Dear Chief Justice Williams:

This is in reply to your letter of April 7, 2003.

I respect your desire to defend the Court and the good names of your colleagues. I believe, however, that you are unnecessarily attributing ad hominem meaning to my comments, sharp as they may have been. Moreover, I do not believe that my comments were gratuitous in the sense that they constituted criticism without purpose.

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141. Letter from Frank J. Williams, Chief Justice, Rhode Island Supreme Court to Carl T. Bogus, Professor of Law, Roger Williams University School of Law (April 7, 2003) (on file with author).

Rather, they were directed at a matter of significant and appropriate public concern.

In the sentence preceding the one you find offensive, I noted that counsel for the House of Representatives urged the Court to accept the view that “the judicial and legislative departments are independent and coequal branches” but that the “diminutive” executive branch does not share the same status. I do not believe there was anything nefarious in counsel advocating that position, and I do not question that members of the Court made their decisions in good faith, based on their analysis of the state constitutional history and language.

Yet the legislature was able to tailor its argument for a particular audience – a Court with a majority who had deep personal or familial ties to the legislature. Two members of the Court had been members of the legislature; another was married to a former member of the legislature and current legislative lobbyist. Observing this by no means suggests these justices do not, as you put it, strive to do their jobs with honor worthy of the public trust. I am confident that they do. Justices are, however, human beings, and like all human beings their perspectives and sympathies are shaped by their backgrounds and relationships. This is hardly a new insight. The entire Realist school of jurisprudence is devoted to studying how judges’ backgrounds affect their decisions.

Does it impugn the five members of the United States Supreme Court who comprised the majority in *Bush v. Gore* to note that they were all appointed by Republican presidents? Is this an appropriate topic for public discourse?

There is another factor at play in Rhode Island. There is reason to believe that the justices’ relationships to the legislature is not mere coincidence but the result of a deliberate legislative program. When in 1997 the House of Representatives refused to confirm Margaret Curran for Court, many found the professed reasons unpersuasive

and believed that the more likely explanation had to do with the looming issue of separation of powers.

Though my comment about an “unholy alliance between the legislature and the judiciary” related to the state of affairs that existed when the Court handed down its separation of powers decisions in 1999 and 2000, it bears mentioning that concern about a legislative program to shape the Court’s composition is not merely historical. Justice Designate Francis X. Flaherty’s brother is Chair of the House Judiciary Committee and someone who played a prominent role in the House’s rejection of separation of powers last year. That hardly defines the totality of Justice Designate Francis Flaherty, who has had a distinguished political and professional career and is highly regarded for his legal ability, judgment, and integrity. It does not demean him to express concern about the continuing appointment of justices with connections to the legislature.

Did the program to influence the Court’s composition (or, to put it more bluntly, to “stack” the Court) influence the Court’s separation of powers decisions? Perhaps no one – even the justices themselves – can say for sure. Is this an appropriate subject of public discourse? I respectfully suggest the answer is yes.

....

The sentence in my op-ed article to which you take umbrage reads: “Not content with an unholy alliance between the legislature and the judiciary to preserve their own status and diminish the executive’s, the people launched this effort to amend the state constitution.” In context both within the text of the op-ed and the history described above, I believe that is a fair statement and stand by it.

You may well disagree. That is your prerogative. But, with all due respect, is it appropriate for the Chief Justice of the state’s supreme court to write a letter excoriating a citizen who criticizes the Court and send a copy of that

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letter to the citizen's employer – as you have done in sending a copy of your letter to Dean Kogan? What would be the purpose of doing that beyond attempting to intimidate or punish that citizen?<sup>142</sup>

## B.

In recent years there have been discussions about whether there are racial disparities in criminal sentencing in the Superior Court of Rhode Island. The Rhode Island courts commissioned two studies on the issue. One study found a difference in perceptions of fairness and bias among demographic groups, with Blacks and Latinos holding a more jaundiced view than Whites and Southeast Asians. A second study, known as the Jenkins study, found that in fact there were no disparities in sentencing due to race.<sup>143</sup> The courts issued a press release announcing the results and quoting Chief Justice Williams as stating, "justice is truly blind when it comes to criminal sentencing in Superior Court."<sup>144</sup>

At the request of the state American Civil Liberties Union chapter, the Jenkins study was independently reviewed by other academics with expertise in studying criminal sentencing. These reviewers contended that the study was flawed because its sample size (381 cases) was too small and it employed inappropriate statistical methodology. One reviewer wrote: "In my opinion, the report is seriously flawed, and its conclusion . . . is certainly misleading and very likely incorrect."<sup>145</sup> Two others stated: "In conclusion, because of the methodological and statistical weaknesses of this study, we have little confidence in the findings pre-

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142. Letter from Carl T. Bogus, Professor of Law, Roger Williams University School of Law, to Frank J. Williams, Chief Justice, Rhode Island Supreme Court (Apr. 14, 2003) (on file with author).

143. See Gerald M. Carbone, *Survey: No Legal Bias Despite Minority Distrust*, PROVIDENCE J., June 14, 2002, at B1.

144. Press Release, Rhode Island Supreme Court, Perception and Reality Differ in Court Studies on Racial Bias, (June 13, 2002), available at [www.courts.state.ri.us/pressreleases6-13-02racialbias.htm](http://www.courts.state.ri.us/pressreleases6-13-02racialbias.htm).

145. Letter from Leo Carroll, Professor of Sociology, University of Rhode Island, to Steven Brown, Executive Director, American Civil Liberties Union, Rhode Island Affiliate (July 22, 2002) (on file with author).

sented in the report.”<sup>146</sup> The ACLU released these critiques to the press.<sup>147</sup>

On October 22, 2002, the Rhode Island Civil Rights Roundtable sent Chief Justice Frank J. Williams a letter about the issue, signed by representatives of the nine state civil rights organizations.<sup>148</sup> The letter asked the courts to commission a second sentencing study, to record the race of criminal defendants in the courts’ computerized database to facilitate future studies, and to insure compliance with a law requiring language interpreters for non-English speaking defendants. It also urged the Chief Justice to use his moral authority to advocate for a more racially diverse judiciary. Although expressing serious concern and stating that the “problems of race and criminal justice run deep,”<sup>149</sup> the letter was polite and respectful throughout. In no fashion did it question the good faith of the courts, the Chief Justice, or anyone connected with the judicial system.

In reply, Chief Justice Williams wrote, in part: “I feel compelled to address my concern at the tone and stridency of your correspondence,” and “I am troubled that the Rhode Island Civil Rights Roundtable seems so willing to take a confrontational approach to the Judiciary.”<sup>150</sup>

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146. Letter from Stephen Demuth, Assistant Professor of Sociology, Bowling Green State University and Darrell Steffensmeier, Professor of Sociology and Crime/Law/Justice, Pennsylvania State University, to Steven Brown, Executive Director, American Civil Liberties Union, Rhode Island Affiliate (Aug. 21, 2002) (on file with author).

147. See Gerald M. Carbone, *ACLU: Court Study Flawed*, PROVIDENCE J., OCT. 15, 2002, at B1; Bruce Landis, *Civil-Rights Advocates Demand Fresh Look at Race, Sentencing*, PROVIDENCE J., Oct. 16, 2002, at B1.

148. Letter from Joseph T. Fowlkes, Jr., et al., to Frank J. Williams, Chief Justice, Rhode Island Supreme Court (Oct. 22, 2002) (copy on file with author).

149. *Id.*

150. Letter from Frank J. Williams, Chief Justice, Rhode Island Supreme Court, to Joseph T. Fowlkes, Jr. (Nov. 4, 2002) (copy on file with author). The Chief Justice also wrote:

I am troubled that the Rhode Island Chapter of the A.C.L.U. did not advise members of the committee [that commissioned the study] that it was concerned about the study results. I am also troubled that the A.C.L.U. did not advise the committee of its intention to send the study out for “independent” review. I am troubled that the A.C.L.U. grandstanded in a press conference without waiting for a response from the study’s author or allow participation of the Rhode Island Judiciary.

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My colleague, Professor Andrew Horwitz, who supervises our law school's criminal defense clinic and is active in the ACLU, was prominently involved in the debate over the Jenkins study. The *Rhode Island Lawyers Weekly* published an interview with Professor Horwitz in which he said, "based on my own perceptions and based on common sense, there clearly are racial disparities in the criminal justice system in Rhode Island."<sup>151</sup> He also criticized the state supreme court's decision not to commission a second study. In a private chat shortly thereafter, a state court judge, seeking to be helpful to Professor Horwitz, warned him that a number of judges were upset with his remarks and that he ought to be careful. The gist of the message, according to Professor Horwitz, was watch your back.

## V.

In a 1998 case, after receiving an unfavorable ruling from the Rhode Island Supreme Court, two lawyers petitioned the court for reargument. In their supporting memorandum, they wrote the following about the court's prior opinion:

The Opinion is a shocking display of judicial indiscretion. It demonstrates judicial activism at its worst, in which the Court first demonstrated what result it wished to reach and then squeezed its rationale to fit the result. The Opinion twists the facts and the law inappropriately to fit the result that the Court desired.<sup>152</sup>

This is boneheaded advocacy. Nothing is more unpersuasive than insulting the very people one is trying to persuade. Moreover, I do not quarrel with the court's view that this was "contemptuous and demeaning" argument and that the "scorn directed at the justices of this Court" warranted sanctions.<sup>153</sup> What troubles me is

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*Id.*

151. *Professor: Courts Do Have Race Problems*, R.I. LAWYERS WEEKLY, Nov. 18, 2002, at 1.

152. Memorandum in Support of the Rhode Island Ethics Commission's Petition for Reargument, at 1, *Clarke v. Morsilli*, 723 A.2d 785 (R.I. 1998) (C.A. No. MP 98-110).

153. *Clarke v. Morsilli*, 723 A.2d 785 (R.I. 1998). I do wonder, however, whether the court would consider it contemptuous for an attorney to argue that a lower court's reasoning was result-oriented, and if not, how the distinctions are to be drawn.

that, according to the court, the intemperate remarks “were the primary focus of much of respondent’s reply memorandum.”<sup>154</sup> Why would opposing counsel bother spending time on them? The remarks were sufficiently prominent by virtue of their nature and placement in the very first paragraph of the memorandum that the court could not possibly miss them. When someone has shot himself in the head there is no reason to fire more bullets into the body. If counsel felt the need to lament opposing counsel’s disrespect for the court, a single sentence would have sufficed. But counsel apparently thought he would gain the court’s favor by condemning opposing counsel at length. And he was right. The court awarded him attorneys fees for this entirely unnecessary time and effort.

To my mind anyway, by demonstrating once again an unhealthy engrossment with punishing critics, which in this case included rewarding those it viewed as helping it do so, the court did its dignity more harm than good.

## VI.

I do not place all of the vignettes on a par. Some, quite clearly, are less serious than others. Nor am I suggesting that any of the judges mentioned is a bad judge. On the contrary, there are attorneys who believe Judges Lagueux and Lisi are good jurists.<sup>155</sup> Judge Lagueux has displayed courage in fidelity to the law,<sup>156</sup> for which I admire him greatly, and anyone acquainted with Chief Justice Williams knows that he cares deeply about the state’s judicial system and wishes to represent it well. These judges, however, reflect the culture in which they have spent their professional lives. It is important to note that, with respect to federal district court, three judges (Lagueux, Boyle, and Lisi) and a

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154. *Id.* at 786.

155. See lawyers’ evaluations of both judges in 1 ALMANAC OF THE FEDERAL JUDICIARY, 69, 71 (First Circuit, Aspen Publishers, 2004).

156. In *Easton’s Point Ass’n. Inc. v. Coastal Res. Mgmt. Council*, No. 84-3737, 1986 R.I. Super. Lexis 50 (Apr. 21 1986), Lagueux, then a judge in Rhode Island Superior Court, held that the doctrine of separation of powers was incorporated in the Rhode Island Constitution. As he surely knew, this decision would make him persona non grata with the state legislature and destroy any chance to be elevated the state supreme court. For an explanation of why this would be the case, see Bogus, *The Battle for Separation of Powers in Rhode Island*, *supra* note 6.

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federal magistrate were involved in enforcing the taboo against criticism. That is nearly half of all of the judicial officers in the district, both active and retired. This is an institutional problem, and that is how it ought to be addressed.<sup>157</sup>

But the problem is not limited to federal district court. This is a problem in the wider professional culture – a culture that equates disagreement with confrontation, institutional criticism with ad hominem attack, and anything that even smacks of personal criticism with contemptuousness. These are self-defeating responses. In each of the incidents I have recounted, the judges did more harm than good to their own reputations and to those of institutions they sought to protect.

Federal district judges and Rhode Island Supreme Court justices are well armored against a critic's arrows. They have life tenure. They do not need to worry about the next election; the ebb and flow of popularity need not concern them. Indeed, popularity cannot, and should not, concern them at all. As human beings, of course, judges are understandably concerned with their professional reputations, but while popularity may rise and fall from news cycle to news cycle, reputations are built and endure over time.

Of course, what properly concerns judges most of all is the esteem in which the bar, the political branches of government, and the public-at-large hold the judicial system. As is often said, courts have no armies.<sup>158</sup> The rule of law depends on respect for the courts. As the United States Supreme Court has put it:

As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of sub-

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157. I recognize that this is a difficult problem to acknowledge or address. One hopes that, at a minimum, the judges in the U.S. District Court for Rhode Island will collectively discuss the matter. One hopes as well that the First Circuit will be cognizant that a special problem may exist in this district and will carefully scrutinize appeals involving judicial retribution for criticism.

158. See, e.g., Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality in Bush v. Gore*, 61 MD. L. REV. 606, 610 (2002); Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 FORDHAM L. REV. 2381, 2396 (1997).

stance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws . . . . Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.<sup>159</sup>

Hypersensitivity to criticism is counterproductive. As everyone understands, thin skin is a characteristic of the insecure. I write these words two days after Justice Anton Scalia recused himself in the Pledge of Allegiance case.<sup>160</sup> Several months ago, Justice Scalia spoke at an event co-sponsored by the Knights of Columbus, an organization that lobbied Congress to include the phrase "Under God" in the Constitution in 1954.<sup>161</sup> In his speech, the Justice said the lower court's decision was an example of how courts misinterpret the Constitution to "exclude God from the public forums and political life." Upon reading press reports of those remarks, the plaintiff (representing himself) asked Justice Scalia to recuse himself, arguing that it appeared the Justice had formed a conclusion about the case and therefore his impartiality might reasonably be questioned. If Justice Scalia ranted and raved about plaintiff's impertinence in questioning his integrity he did so out of public view.<sup>162</sup> What he did publicly was simply make what he

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159. *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992).

160. *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2002).

161. See Linda Greenhouse, *Supreme Court to Consider Case On "Under God" in Pledge to Flag*, N.Y. TIMES, Oct. 15, 2003, at A14.

162. Subsequently, Justice Scalia denied a motion that he recuse himself from a case in which advocacy groups sought information about the inner workings of the National Energy Policy Development Group, chaired by Vice President Cheney. Plaintiffs wanted to discover to what extent energy industry officials shaped energy policy. The Sierra Club requested that Scalia disqualify himself because, shortly before the case was argued, Scalia and Cheney had been together on a duck hunting trip in Louisiana. As he himself put it, Scalia "received a good deal of embarrassing criticism and adverse publicity in connection" with the matter. *Cheney v. U.S. District Court*, 124 S. Ct. 1391, 1403 (2004). It would have been only human if Scalia were peeved at Sierra Club's lawyers. And in his opinion, Scalia pointed out some

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thought to be the correct decision.<sup>163</sup> That is how a confident judge preserves his dignity.

Substance as well as perception is at stake, for an institution that cannot tolerate criticism is inherently unhealthy. A lack of criticism leads inevitably to distorted self-perceptions. An institution that cannot hear criticism will lose opportunities to correct errors and improve, and will never achieve its full potential.

The legal community's culture is created and preserved by both judges and lawyers, but by virtue of their numbers alone, mostly by lawyers. And, of course, most judges are acculturated into the legal profession while still at the bar. To affect real change, therefore, the bar must work consciously to change its own culture, as difficult as this may be.

Lawyers need to stop supporting judges in punishing critics. The Harvard Law School Association of Rhode Island did Judge Lagueux no more of a favor than did the Emperor's ministers when they failed to tell him he was wearing imaginary clothes. Lawyers ought to think carefully before egging judges on to punish critics, even when the criticism has stepped over the line and punishment might be appropriate. Courts can take care of themselves. The lawyer who spent time and energy to decry at length opposing counsel's intemperate remarks about the court's prior

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hypocrisy on the part Sierra Club's lead counsel, who during the same time period had invited Scalia to California, at Stanford University's expense, to speak to a class the lawyer was teaching. *Id.* at 1402-03. Nevertheless, even in these trying circumstances, Scalia's opinion – though characteristically forceful (and, in my judgment, flawed) – was neither mean-spirited nor unnecessarily *ad hominem*. He decided the motion, explained his reasoning, and let the matter rest.

163. He recused himself. For our purposes, however, there is no distinction between recusal motions that should be granted or denied. If, for example, the press had inaccurately reported his remarks and Justice Scalia decided to not recuse himself, I doubt he would have excoriated the plaintiff for raising the issue. Nor do I think he would have been offended because plaintiff did not rely on him to do the right thing without giving him a nudge. For purposes of sanctions, the only distinction is between colorable and frivolous motions. No attorney should be punished for filing a colorable motion, whether for recusal or anything else. Recognizing the difficulty of being a judge in one's own cause, the wise court will give attorneys the greatest benefit of the doubt in precisely those matters that might be expected to get the court's back up. Similarly, the confident court will be slow to interpret criticism as insult.

decision may have helped himself and his cause in the short run, but he did so at some long-term cost to the legal community.

A number of years ago in federal district court in Philadelphia, a frustrated judge lambasted a young lawyer for something that earned the judge's displeasure.

The mature and distinguished opposing counsel rose and made remarks along the following lines: "Your honor, I hope you will not hold what I am about to say against my client, but I feel compelled to say that I have observed Mr. \_\_\_\_'s work throughout this matter and I can tell you he has acquitted himself well. With all due respect, sir, I believe the court's comments to him were not warranted."<sup>164</sup> Now, this is directly criticizing a judge – indeed, a judge who happens to be in the throws of frustration – and that is always a risky undertaking. The safer approach is to sit still and take the attitude that if opposing counsel is suffering an unjust scolding, that it is his problem. Consider, however, how such an episode shapes professional culture.

In writing this essay, I have puzzled over why so many incidents involve out-of-state counsel. Do Rhode Islanders engage out-of-state lawyers more often than citizens from other states? If so, why? Do out-of-state lawyers behave differently than Rhode Island lawyers? To what extent were protectionist attitudes among Rhode Island lawyers and judges, who wish to exclude carpetbaggers, at work? Surely, part of the answer involves a clash of professional cultures. It is not that out-of-state counsel treat judges with less respect than their Rhode Island counterparts. In fact, among all of the incidents that I have recounted, it was Rhode Island lawyers only who could reasonably be accused of disrespectful conduct.<sup>165</sup> While wrestling with these questions, I was struck by some comments by Robert B. Mann. Following the dismissals of Scheck and Brustin, Mann, who had been local counsel, was suddenly thrust into the role of trial counsel. He moved for a mistrial.

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164. Although I did not witness it, this incident was described to me by the young lawyer who had suffered the tongue lashing. I remember the gist of the remarks only, and use quotation marks to mark off the lawyer's statement and not to indicate this is quoted verbatim. The incident occurred in open court but only the judge, counsel, and court personnel were present. The judge made no comment, and apparently did not hold the remarks against counsel.

165. The incident described in section V.

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As part of his argument, Mann noted that he had also signed the memorandum that offended Judge Lisi and was facing possible sanctions at the end of the case. "I am somewhat chilled and somewhat afraid of the specter of what is coming after the trial," Mann told Judge Lisi.<sup>166</sup> Mann also said his client also "feels that I am afraid or chilled in my advocacy."<sup>167</sup>

I fear that Rhode Island lawyers practice law within a culture that chills their advocacy all of the time. Out-of-state lawyers have difficulty in Rhode Island because they were acculturated differently. They have not been ingrained with a strongly enforced taboo against criticism, even appropriate and respectful criticism. I can only wonder whether this has anything to do with Rhode Islanders wishing to retain out-of-state counsel. Rhode Island lawyers are every bit as well-educated, experienced, and skilled as lawyers from other jurisdictions. But they may be more chilled in their advocacy, and perhaps, sensing that, Rhode Islanders engage out-of-state lawyers they believe can be more forceful. If this is the case, Rhode Island lawyers would benefit professionally and commercially from culture change.

Even more importantly, Rhode Island and her citizens who would benefit from culture change. The state needs Rhode Island lawyers to be public critics of those aspects of the judicial system they find wanting. From the many comments made to me, I know that Rhode Island lawyers recognize that their professional community is plagued by the taboo against criticism. Many have told me they are happy that there is now a law school in the state to critique the judiciary. My colleagues will do their part, but it is a mistake to count on us alone.<sup>168</sup> Practitioners know the judicial system best, and their criticism is indispensable.

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166. See Fitzpatrick, *Lawyer Argues for Mistrial*, *supra* note 119 (quoting Mann).

167. *Id.* (quoting Mann).

168. Although we are a prolific faculty, most of our attention is focused on national (and international) issues. That is unlikely to change; academics get more professional mileage out of addressing a wider audience. Nevertheless, we will from time to time make our own contributions to the state justice system. See, e.g., Andrew Horwitz, *The Right to Counsel in Criminal Cases: The Law and Reality in Rhode Island District Court?*, 9 *ROGER WILLIAMS U. L. REV.* 409 (2004); Robert B. Kent, *Rhode Island Civil Procedure – Some Problems*, 9 *ROGER WILLIAMS U. L. REV.* 429 (2004); Larry J. Ritchie, *Justice in Rhode Island – Edson Toro and Procedural Default*, 9 *ROGER WILLIAMS U. L. REV.* 455 (2004) (all criticizing aspects of Rhode Island law).

Rhode Island lawyers live in a culture in which criticism is considered professional treason and punished by both courts and colleagues. The culture cannot be changed without lawyers themselves stepping forward. Lawyers must become critics – thoughtful, respectful critics to be sure, but critics nonetheless. I recognize how difficult this will be. Rhode Island has a small legal community, and a lawyer who antagonizes even one judge has saddled herself with a significant professional handicap. There is strength in numbers, however, and lawyers should act collectively through their bar associations or ad hoc committees.

Lawyers are not merely legal technicians. They are leaders. Half of the signers of the Declaration of Independence were lawyers.<sup>169</sup> At this writing, half of all the nation's governors and United States senators are lawyers.<sup>170</sup> Throughout the nation's history, more than two-thirds of all presidents, vice presidents, and members of the cabinet have been lawyers. The pantheon of American lawyers includes Jefferson, Hamilton, Marshall, John Adams, Daniel Webster, Lincoln – and in Rhode Island Thomas Wilson Dorr and John Pastore. Lawyers – including the likes of Mahatma Gandhi and Shirin Ebadi, the Iranian woman who received the Nobel Peace Prize in 2003 – have been courageous leaders around the world. Rhode Island needs its lawyers to provide leadership in the law and beyond. But leadership will never adequately emerge out of a culture of quiescence.

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169. For all percentages of lawyers in leadership roles, except where otherwise cited see Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 930 (1996), and sources cited therein.

170. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341 (2003).