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Bad Decisions, Bad Judging: A Glimpse at the Dark Side of the Judiciary

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Abstract

Preserved for posterity in the Southern Reporter are the following assurances from the Florida Supreme Court:

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KEYWORDS: dark side, bad judging

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I. Introduction

Preserved for posterity in the *Southern Reporter* are the following assurances from the Florida Supreme Court:

[E]very litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of [a judge] to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his courtroom speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the courtroom should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.¹

Most judges have honored these commands. This article deals with two types of judges who have not.

II. Bad Decisions

Some judges make bad decisions, whether they are judging sport-

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The author dedicates this article to his wife Marilyn, and his daughters Katie and Laura.

1. *State ex rel. Davis v. Parks*, 194 So. 613, 615 (Fla. 1939).

ing contests² or lawsuits.³ In the present context, a "bad" decision means one unfaithful to the written law. The United States Supreme Court, in writing that litigants have "no [constitutional] entitlement to the luck of a lawless decisionmaker,"⁴ has tacitly admitted that bad legal decisions occur. The experience of the judiciary with ethically difficult issues, such as the death penalty, has yielded numerous such decisions.

In fully one-half of those cases which involved state court affirmed death sentences, the Eleventh Circuit Court of Appeals has ruled favorably to the defense.⁵ This is about par for the course.⁶ This necessarily suggests two possibilities: either that the state courts are so inept at detecting preserved constitutional infirmities in such cases that they can do no better than meet the law of averages, or that the federal appellate courts second-guess the judgment of the state courts much too frequently.⁷ Rose Bird, former Chief Justice of the California Supreme Court, reportedly has voted against affirming sentences of death at every opportunity.⁸ This necessarily suggests an indulgence in outcome-oriented jurisprudence by either a large number of lower court California judges or by the Chief Justice herself.⁹

One may certainly invoke the spectre of the decline and fall of the Roman Empire or the Holocaust of Nazi Germany to persuasively argue that adherence to a higher moral law justifies reaching results in such cases at variance with the command of the written law. There are indeed times when, in the immortal words of Charles Dickens, "the law is a[n] ass."¹⁰ Even allowing for honest differences of opinion, however, one may not convincingly deny that some judges in the foregoing cases have refused to properly apply this written law. If the law meets our

2. Goldman, *The Ten Worst Decisions of All Time*, RING MAGAZINE, May 1986, at 40.

3. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

4. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

5. Henry, *Representation of Death Sentenced Inmates*, FLA. B. J., Dec. 1985, at 53.

6. *Death Row Suit: Inmates Cite Lack of Counsel*, A.B.A. J., May 1986, at 30.

7. But see HUFF, HOW TO LIE WITH STATISTICS (1st ed. 1954); B. JAMES, THE BILL JAMES BASEBALL ABSTRACT 1985 154 (1985).

8. *Bird Hunting in California*, NEWSWEEK, December 9, 1985, at 30. On November 4, 1986, the voters of California removed Rose Bird from the bench.

9. See J. FRANK, COURTS ON TRIAL (1st ed. 1949).

10. C. DICKENS, OLIVER TWIST 520 (U.S.A. ed. 1941).

moral disfavor the remedy should ultimately be to seek democratic legislative modification, not autocratic judicial nullification.

Our courts write, aspirationally, that "[j]udges are required to follow the law. . . . No judge is permitted to substitute his concept of what the law ought to be for what the law actually is."¹¹ But when judges violate this lofty creed, whether for reasons of conscience or malice or simple ineptitude, there is little that lowly litigants can do. Refusal to comply with the court's mandate, in a kind of counter civil disobedience, is out of the question.¹² It is very difficult to impeach judges even for gross improprieties such as accepting bribes,¹³ let alone for debatably refusing to correctly apply the law.¹⁴ Such will not reverse the result in a given case. Recourse to a higher court, though often problematic and a long shot under the best of circumstances, offers the only realistic possibility for relief.

III. Bad Judging

This article now shifts its focus away from American judges who make bad legal decisions, toward Florida judges who make bad legal decisions. The focus is now on judges who, in the words of Harry S. Truman, "don't understand the power of [public officials] to hurt" people through impolite dealing.¹⁵ Alan Dershowitz has observed that some judges betray a "meanness of spirit . . . beneath the[ir] robes."¹⁶ A small minority of Florida's judges violate the spirit, if not the letter, of Canon 3(A)(3) of the Code of Judicial Conduct, which declares that "[a] judge should be patient, dignified, and courteous to litigants . . . [and] lawyers . . . with whom he deals in his official capacity."¹⁷ Are judges who judge badly as impervious to oversight as those who make bad decisions?

Unfortunately, such judges are far too often insulated from effec-

11. *In re Taunton*, 357 So. 2d 172, 179 (Fla. 1978); see also *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *State ex rel. Sagonias v. Bird*, 67 So. 2d 678, 681 (Fla. 1953).

12. *Turner v. Department of Professional Regulation*, 460 So. 2d 395, 396 (Fla. 5th Dist. Ct. App. 1984).

13. See generally *Two and Two Equal not Guilty*, TIME, February 14, 1983, at 66.

14. But see *Bird Hunting in California*, *supra* note 8.

15. M. MILLER, PLAIN SPEAKING 401 (1974).

16. A. DERSHOWITZ, THE BEST DEFENSE xviii (1982).

17. FLA. CODE OF JUDICIAL CONDUCT Canon 3(A)(3).

tive rebuke, particularly if they are appellate judges. Veteran appellate practitioners commonly trade "war stories" regarding abusive treatment that they or their colleagues have received at the hands of certain notorious federal and state appellate court judges. Such treatment has occurred during oral arguments and in written opinions. Of course there are times when either oral or written appellate judicial condemnation of attorneys or litigants is warranted.¹⁸ However, such condemnation loses all meaning when it is not reserved for instances of clear and substantial illegitimate conduct. This is especially true considering that the Florida appellate courts seldom praise lawyers for performing well. There are no reported cases of such courts either so much as apologizing to the parties or chastising themselves or lower appellate courts for abusive behavior.

Florida's trial judges have been called upon to pay a greater price for injudicious behavior than that exacted from their appellate overseers. For example, one trial judge was infamous for his repeated instances of "irascibility and intemperate, irrational behavior,"¹⁹ which included detaining a delivery truck driver for blocking his reserved parking space.²⁰ He was found unfit by the Florida Supreme Court "due to his tendency to lose his temper when confronted by the human failings and shortcomings of others"²¹ and was ordered removed from the bench.²² Another judge equally notorious for being "rude and inconsiderate of attorneys and court personnel"²³ escaped with a public reprimand for his conduct and went on to become a United States Representative, only to be imprisoned for accepting bribes.²⁴ Yet another judge also known for "repeated instances of arrogance, and a lack of courtesy, dignity and patience to litigants, witnesses, lawyers and others"²⁵ was publicly reprimanded for such conduct.²⁶ Despite his re-

18. See Tiedemann, *The Outer Limits of Florida Appellate Advocacy*, FLA. B.J., May 1986, at 111; see also Tiedemann, *State Prisoner Abuse of the Federal Writ of Habeas Corpus Through Factual Misrepresentations: Suggested Sanctions*, 53 FLA. B.J. 677 (1984).

19. *In re Crowell*, 379 So. 2d 107, 109 (Fla. 1979).

20. *Id.*

21. *Id.* at 110.

22. *Id.*

23. *In re Kelly*, 238 So. 2d 565, 568 (Fla. 1970), *cert. denied*, 401 U.S. 967 (1971).

24. *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 908 (1984).

25. *In re Lantz*, 402 So. 2d 1144, 1146 (Fla. 1981).

26. *Id.* at 1147.

penance he was voted out of office by the public shortly thereafter.²⁷ Recently, still another judge, who "misused his judicial authority in threatening litigants who complained about his conduct," was removed from office for this and numerous other transgressions.²⁸ Florida jurisprudence has known many fine moments; the foregoing are not among them.

Obviously, a judge should not be removed "from office on the grounds that he possesses an unpopular philosophy, has offensive idiosyncracies, has rendered unpopular decisions or is too compassionate."²⁹ Nor may lawyers or litigants bait a judge into displaying justifiable anger towards them and then successfully demand his recusal in a given case.³⁰ But by and large, a judge must not let "his emotions instead of his judgment get in the driver's seat."³¹ As the Florida Supreme Court has stated:

We canonize the courthouse as the temple of justice. There is no more appropriate justification for this than the fact that it is the only place we know where the rich and poor, the good and the vicious, the rake and the rascal — in fact every category of social rectitude and social delinquent — may enter its portal with the assurance that they may controvert their differences in calm and dispassionate environment before an impartial judge and have their rights adjudicated in a fair and just manner. Such a pattern for administering justice inspires confidence. The legend on the seal of this court — "sat cito si recte" (soon enough if right or just) — embossed on the floor in the rotunda of this building, encourages devotion to such a pattern. Litigation guided by it makes the courthouse the temple of justice. When judges permit their emotions or the misapplication of legal principles to shunt them away from it, they must be reversed. The judge must above all be neutral and his neutrality should be of the tough variety that will not bend or

27. M. BARONE & G. UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 243 (1983).

28. *In re Damron*, 487 So. 2d 1, 7 (Fla. 1986).

29. *In re Taunton*, 357 So. 2d at 177-78.

30. *Dempsey v. State*, 415 So. 2d 1351, 1352 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 424 So. 2d 761 (Fla. 1982); *Hayslip v. Douglas*, 400 So. 2d 553, 558 (Fla. 4th Dist. Ct. App. 1981) (Letts, C.J., concurring specially). *See also Baisden v. State*, 203 So. 2d 194 (Fla. 4th Dist. Ct. App. 1967).

31. *Williams v. State*, 143 So. 2d 484, 488 (Fla. 1962).

break under stress.³²

IV. Conclusion

The Florida Supreme Court has stated that "[a] judge is required to conduct himself under standards which are much higher than those required of an attorney"³³ or, presumably, of a litigant. Although this is the case with regard to many matters, it is certainly not the case with regard to fidelity to the letter of the law or demeanor in the courtroom.³⁴ Lawyers and the public have no short-range and precious little long-range protection against judicial lawlessness and temper tantrums absent the self-restraint of judges themselves. Fortunately, most of Florida's judges nonetheless treat those appearing before them with the impartiality and the respect that they deserve both as taxpayers and as human beings.

32. *Id.* at 488. See also *State ex rel. Davis v. Parks*, 194 So. at 615.

33. *In re La Motte, Jr.*, 341 So. 2d 513, 517 (Fla. 1977).

34. *Cf. Sandstrom v. State*, 309 So. 2d 17 (Fla. 4th Dist. Ct. App. 1975), *cert. discharged*, 336 So. 2d 572 (Fla. 1976).