

# Exposing prosecutors, but not judges: journalistic hypocrisy, or calculated self-interest?



Years ago, I found myself at a book party held for novelist E.L. Doctorow of the *Ragtime* fame (it was not that I was in some privileged class of his invited friends – the party was held in a public space, and whoever was near was welcome to walk in.) A glass of wine and a few hors d'oeuvres put me into a talkative mood, and I struck up a conversation with an elderly gentleman who reached into a tray of refreshments at the same time as I did. “I play tennis with Edgar,” he said, “I am not a writer, but a retired lawyer.” That impressed me

greatly. "I have a lawyerly story to tell you" I replied. "I sued the government, and – believe it or not – when writing their decisions, the judges replaced in them my lawyer's, and the government lawyers' argument with judges' own utterly bogus one, so as to decide for the government." His smiling, pleasant demeanor disappeared. He look at me sternly, staring straight into my eyes. "The court system is not geared toward justice" he said. "The system has its uses, but justice is simply not one of them."

I was too astonished – or perhaps too drunk – to ask him what its actual purpose was, though I later heard from others that courts were aiming at social stability, interpreted as keeping in place the prevailing system of privilege. The malcontents like me want to upend the status quo, to eat into the privileges of the powerful, but the courts keep those privileges where they are – by means fair or, if needs be, foul.

Now that I think of it, this explains the deeply puzzling instance of journalistic hypocrisy that I could not understand before – press' adamant refusal to shed light on judges' brazen violation of due process as they engage in decision-making. Even judges' open admission that they act from the bench "maliciously and corruptly" (the right which they gave themselves in *Pierson v Ray*) does not cause the likes of the *New York Times* to report this admission as bizarre and sensational news.

This is in sharp contrast with the paper's recent editorial titled "[Who Will Hold Prosecutors Accountable?](#)" that unleashed the paper's righteous indignation at the law that keeps the complaints of prosecutorial misconduct secret and inaccessible to the public, resulting in "prosecutor-protection racket" as the the *New York Times* put it.

To me, this sounded like yet another instance of *New York Times'* routine hypocrisy – decrying prosecutors' dishonesty,

but refusing to shed the disinfecting light of public scrutiny upon the dishonesty of federal judges, as if judges were not part of the government, and thus exempt from public control of their actions via press investigations and coverage. But now it dawned on me that, from the *New York Times*' perspective (a perspective that is obviously shared by their colleagues throughout the legacy media), prosecutorial malfeasance and that of the judges were two very different things indeed.

Think of it: can a prosecutor do anything to the *New York Times*? No: prosecutors deal with criminals, the people who kill, rob, steal, rape, deal in drugs – and the *New York Times* cannot, by the very nature of things, engage in suchlike prosecutable criminality. Hence, the paper has nothing to fear from the prosecutors, and can bash them publicly all it wants. With judges, the story is very different indeed. There are plenty of non-criminal situations in which the paper can face prosecution, and be dragged before a judge – claims of defamation, for one – and the papers would rather not give judges a reason for revenge (which judges can easily exact, for instance by annulling the landmark decision in *New York Times v Sullivan* which defines media's lies as protected speech, shielding the press from the charges of defamation.)

But even this is not all there is to it. Take a broader view. If judges had to follow in their decision-making process the “due process of the law,” as the Constitution calls it, and limit themselves to mere evaluation of parties' argument (or to “calling balls and strikes” rather than “pitching and batting,” in the words of Chief Justice Roberts, or just being an “umpire” that is Justice Kavanaugh's favorite comparison), how would judges be able to follow their function of providing stability at the expense of justice? Under due process, the law enacted by a man acts just as the law made by God – it becomes non-selective, hitting the haves and the have nots equally – just like a loosened brick is forced, by God-mandated law of gravity, to fall down, indiscriminately

hitting whoever had the misfortune to stand below it, be he black or white, rich or poor, good or bad, a Republican or a Democrat, a have or a have not. The *New York Times*, being very much the haves, cannot possibly like any arrangement that would make it vulnerable by putting it on equal footing with have nots like myself, thus turning the court system into an instrument of justice, instead of that of keeping intact the power of the powers that be. The paper has a vital interest in having a judge rule for it, and against the likes of myself – which would be impossible if the “corrupt and malicious” mode of judging became unavailable to judges, having been discredited by the press.

This is why publishing a fiery editorial righteously attacking “prosecutor-protection racket” is all fine and good, but informing the public of the “judge-protection racket” is a different matter entirely, hypocrisy playing but a tiny part in it. As far as the *New York Times* is concerned, prosecutors cannot upend the social order and make me equal to the *New York Times* (or at least to the corporate book publishers, as I demanded in my lawsuit) – but judges can (and would in fact have no choice but to do so, if “due process of the law” were enforceable). So the *New York Times* chooses its battles wisely – it bashes those who cannot harm it – the prosecutors, but gives a wide berth to those who are equally corrupt, but whose public exposure would be counter-productive – the judges. And there is no downside for the paper: to a casual reader of its opinion piece, the *New York Times* comes across as a principled champion of justice – while being nothing of a kind, but hating and fearing justice with every fiber of its deeply corrupt and hypocritical soul.

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