NORMA LEVY SHAPIRO

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Had she been born half a century earlier, she might have written her eighth-grade essay on Susan B. Anthony, or Florence Nightingale, or perhaps Jane Addams. But, fortunately for the law, Norma Levy was born in 1928, and so it was that she chose as the subject of her essay—and role model—Florence Ellinwood Allen, a Justice of the Ohio Supreme Court who, in 1934, was named by President Franklin Roosevelt to a seat on the United States Court of Appeals for the Sixth Circuit. Judge Allen was the first woman to serve as a judge on a federal court established under Article III of the Constitution. Aspiring to go Judge Allen one better, Norma Levy decided to be the first woman appointed to the Supreme Court. But that goal was to elude her—one of the few goals that has. Instead, pursuant to appointment by President Jimmy Carter in 1978, Norma Levy—by then, Norma Levy Shapiro—became the first woman to serve on the United States District Court for the Eastern District of Pennsylvania and, thereby, the first woman judge of any Article III court in the entire Third Circuit.[1] (When Norma Levy Shapiro became Judge Shapiro in 1978,

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1 The following year President Carter appointed Dolores K. Sloviter to the United States Court of Appeals for the Third Circuit, Sylvia H. Rambo to the United States District Court for the Middle District of Pennsylvania, and Anne E. Thompson to the United States District Court for New Jersey.

President Carter, with the strong support of his Attorneys General (Griffin B. Bell followed by Benjamin R. Civiletti), was the first president to give serious and sustained attention to the appointment of women (and, equally important, of African Americans) to the federal bench. President Carter's appointment of four women to judgeships in the Third Circuit was paralleled by Carter appointments of women judges, both trial and appellate, in several of the other judicial circuits.

Because not all of President Carter's successors have kept pace with his initiative, there is still a substantial gender imbalance (as well as racial imbalance) in every circuit. In the four jurisdictions comprising the Third Circuit (Delaware, New Jersey, Pennsylvania, and the Virgin Islands), the gender distribution, as of September 2003 when this essay is being written, is as follows: (1) Of the ninety-three district judges, active and senior, in the Third Circuit, only fifteen are women. (2) Things are better at the appellate level: of the twenty judges (twelve in active status, eight senior) of the third Circuit Court of Appeals, four (all in active status) are women. Of the non-Article III judges in the Third Circuit, there are thirteen women magistrate judges and nine women bankruptcy judges.

there were only seven other women on the federal bench in the entire country.)

And so, for twenty-five years, Judge Shapiro (hereinafter, "Shapiro"[2]) has been an ornament of Article III. But it is not her firstness[3] that sets her apart. What stamps her as remarkable are the wisdom, strength, and sensitivity that have characterized her judicial performance day after demanding day. These are the qualities that those of us privileged to be her judicial colleagues here in Philadelphia have had the good fortune to be particularly familiar with.[4]

To acquire a comprehensive sense of the excellence of Shapiro's judging would call for parsing and close assessment of at least a representative sample of the hundreds of cases she has had in charge in her quarter-century on the bench. An intensive scholarly appraisal of that sort is beyond the scope of this celebratory tribute. But there is one case of Shapiro's which may properly be looked to as a proxy for the entirety of her caseload—for it drew on her (seemingly inexhaustible) energies for eighteen years, and it required her to perform tasks that,

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[2] How best to refer to the subject of this essay has seemed something of a puzzle. Needless to say she is "Norma" to all her judicial colleagues, not alone here in the eastern district but throughout the third circuit and, indeed, throughout the length and breadth of Article III; and she is also "Norma" to endless other constituencies, lawyers and non-lawyers alike, young and old, here in Philadelphia and across the land, of whom the author of this essay is one. However, for thosee many readers of this issue of the Law Review who do not have the good fortune of being personally acquainted with Norma, she is "Judge Shapiro." But to refer to her by title throughout this essay would be cumbersome and off-putting. The compromise designation adopted here is "Shapiro," a form of address used by none of the Judge's constituencies and hence, for present purposes, appropriately neutral

[3] On graduating from the University of Pennsylvania Law School in 1951, Shapiro was chosen by Pennsylvania's Chief Justice Horace Stern as his law clerk, the first woman to be appointed to a Pennsylvania Supreme Court clerkship. Later, after several years as a highly achieving litigator at the firm Dechert, LLP, Shapiro became the first woman to serve on, and subsequently to chair, the Board of Governors of the Philadelphia Bar Association. Had she, in 1978, elected not to become a judge but to stay in practice, there was an odds-on likelihood that, within a year or two, she would have become the first woman chancellor of the Philadelphia Bar Association. Whether Shapiro would, in the fullness of time, have then gone on to become the first woman president of the American Bar Association (ABA) is, of course, rather more speculative. But donning a robe has not precluded important ABA activity: Shapiro has pursued, with great effectiveness, those ABA roles that are appropriate for judges. We who are Shapiro's District Court colleagues are particularly proud that, as of this year, she has ascended to membership in the ABA Board of Governors. For an accounting of Shapiro's significant contributions to the work of the ABA, see the Tribute by one of the nation's leading lawyers, former ABA President Jerome J. Shestack, in this issue of the *Law Review*. 152 U. Pa. L. Rev. 21 (2003).

[4] An added dimension of our collegial devotion to Shapiro is our gratitude for her sisterly caring for each of us—on birthdays and all days in between.

fortunately, few judges have occasion to undertake. The case was *Harris v. City of Philadelphia*.[5] *Harris* began in 1982 as a class action filed *pro se* by inmates of Holmesburg Prison complaining that flagrant overcrowding had created debilitating and degrading—effectively hyper-punitive—conditions transgressing the Eighth and Fourteenth Amendments. Far from being eager to exercise jurisdiction, Shapiro abstained: in Shapiro's view, the Court of Common Pleas, in which similar litigation had been commenced some years before, was the more appropriate forum to address problems besetting Philadelphia's prison system. But the Court of Appeals in 1985 concluded that, notwithstanding the ongoing state court litigation, the federal claims warranted federal judicial scrutiny.[6] The case was back on Shapiro's docket.

In 1986, the plaintiff class and the City of Philadelphia entered into a court-approved consent decree that provided, inter alia, for (1) construction of a new detention center within four years, and (2) in the event that Philadelphia's prison population rose above an agreed maximum, (a) the discharge from custody of inmates whose sentences were to end in sixty days and (b) the release pending trial of pre-trial detainees charged with minor offenses. To oversee compliance with the consent decree, a Special Master was appointed. But the new detention center promised by the City for 1990 did not materialize, and in 1991 a new consent decree contemplating substantially more effective and extensive municipal compliance was entered into. Some sense of the range of Shapiro's manifold supervisory roles can be gleaned from two paragraphs of her 2000 opinion closing the books on *Harris*:

> Relief, both short and long term, for the overcrowded facilities was anticipated by the 1991 Decree. The short term relief included expanded capacity and early release of eligible pretrial detainees. Thus, the court has overseen the construction and completion of an additional prison facility, Curran Fromhold Correctional Facility ("CFCF"), and a new criminal courthouse, the Criminal Justice Center at 12th and Filbert

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[5] 2000 U.S. Dist. LEXIS 12579 (E.D. Pa. Aug. 30, 2000).

[6] Harris v. Pernsley, 755 F.2d 338 (3d Cir. 1985), *reh'g denied,* 758 F.2d 83 (3d Cir. 1985) [*Harris I*]. The *Harris* litigation has often revisited the Court of Appeals: Harris v. Pensley, 820 F.2d 592 (3d Cir. 1987) [*Harris II*]; Harris v. Reeves, 946 F.2d 214 (3d Cir. 1991) [*Harris III*], *reh'g denied en banc,* 1991 U.S. App. LEXIS 26055 (3d Cir. Oct. 31, 1991); Harris v. Philadelphia, 35 F.3d 840 (3d Cir. 1994) [*Harris IV*]; Harris v. Philadelphia, 47 F.3d 1311 (3d Cir. 1995) [*Harris V*]; Harris v. Philadelphia, 47 F.3d 1333 (3d Cir. 1995) [*Harris VI*]; Harris v. Philadelphia, 47 F.3d 1342 (3d Cir. 1995) [*Harris VII*]; and Harris v. Philadelphia, 137 F.3d 209 (3d Cir. 1998) [*Harris VIII*].

> Streets in Center City, Philadelphia. The Holmesburg facility, from which the action originated, has been closed. In addition, the Alternative and Special Detention Central Unit ("ASDCU"), a minimum security facility was built. After extensive litigation over compliance with industry standards, *see Harris IV*, n.1, the parties reached a settlement requiring the City to provide job, vocational or educational programs to all inmates housed there. The court approved the settlement on March 31, 1995.
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> The City is currently building a new Women's Detention Facility to increase female capacity. The City does not intend to close or renovate the House of Correction as set forth in the City's Ten Year Plan.
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> In accordance with the 1991 Consent Decree and as set forth in its Alternatives to Incarceration Plan, the City has contracted for community-based substance abuse treatment and support services for paroled inmates in a program called Forensic Intensive Recovery ("FIR"). Its purpose is to enhance community safety by reducing criminal recidivism in providing supervised treatment of substance abuse and mental illness as an alternative to incarceration. There are currently fifty-three drug and alcohol programs providing clinical evaluation, residential treatment, or intensive outpatient treatment services to over 1200 participants as an alternative to incarceration. The recidivism rate of program participants has been significantly lower than that of inmates not in the program: it is a true success story.[7]

But no good deed goes unpunished. It was expectable that federal judicial oversight of Philadelphia's prison system would, from time to time, require the court to address difficult and warmly debated issues, and that a litigant or interest group on the losing side of such an issue might give public expression to dissatisfaction with an adverse decision. Fair criticism of what courts do is normal and, in general, to be welcomed. As Judge William Hastie put it thirty years ago, in a Roberts Lecture here at the University of Pennsylvania, "principled criticism serves as an invaluable corrective of otherwise unrealized error."[8]

What was not expectable was that, in a circumstance in which federal judicial oversight was the consequence of decrees the city had assented to and, indeed, had a major hand in shaping, a ranking local law enforcement official would spice up criticism of the judge's decisions by impugning the judge's motives. Yet this was the course pursued by a senior Philadelphia prosecutor who, in 1994, advised a waiting world that the judge "sees it as her personal mission to bring

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[7] 2000 U.S. Dist. LEXIS 12579, at *8-9.

[8] William H. Hastie, *Judicial Role and Judicial Image*, 121 U. PA. L. REV. 947, 951 (1973).

about change in the penal system. But she's elevated the rights of the prisoners above the rights of everyone else, and she's done it without regard to the consequences."[9] A comment of this sort by a public official who, on behalf of the executive branches of both state and local government, has major responsibilities for the administration of justice, carries with it the real risk of undermining public confidence in the judicial process—and the risk is compounded when the official is a lawyer, an officer not only of the state courts, but of the very federal court whose commitment to justice the lawyer is calling into question. And there is the related risk that a judge may be cowed by criticism of this malign sort—criticism to which, by virtue of judicial office, a judge cannot effectively reply—and may then conform future decisions to the perceived norms of the loud-speaking executive official, thus fatally compromising the independence of the judiciary.[10] Fortunately (and just as one would expect) Shapiro is made of sterner stuff: she has never given in to the sideline yahoos, however lofty their rank or shrill their voices, and never will.[11] This is true outside the courtroom as well as within, as evidenced by the words of tribute paid to Shapiro when the American Bar Association's Standing Committee on Federal Judicial Improvements conferred on her its Meador-Rosenberg Award. In listing a number of Shapiro's "profound contributions to the administration of justice," the Standing Committee took particular note of the fact that Shapiro "has relentlessly pursued projects and initiatives that promote the importance of an independent judiciary."[12]

Of Shapiro's seemingly endless string of honors, the Meador-Rosenberg Award, conferred on August 7, 2003, is not even the most recent. On August 8, 2003, Shapiro was honored by the National Association of Women Judges with its Excellence in Service Award.[13]

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[9] Zachary Stalberg, Editorial, PHILA. DAILY NEWS, June 20, 1994, at 31. Not to be outdone, Editor Stalberg saw fit to confer on Shapiro the sobriquet "Public Enemy Number One." *Id.* This sort of mindless journalistic excess tends to give the First Amendment a bad name; but, as against the inappropriate calumnies of public officials, it is relatively harmless.

[10] *See* Louis H. Pollak, *Criticizing Judges*, 79 JUDICATURE 299 (1996).

[11] *Harris* continued, under Shapiro's wise and even-handed adjudication, until the end of the decade. On August 30, 2000, *Harris* was concluded pursuant to court approval of a settlement agreement entered into by the parties on June 28, 2000. The termination of the litigation via the court-approved Settlement Agreement was in harmony with the Prison Litigation Reform Act, 18 U.S.C. § 3626 (2000) [PLRA]. For an authoritative discussion of the PLRA, see *Miller v. French*, 530 U.S. 327 (2000).

[12] Remarks of Tom Hayward, ABA Annual Meeting, (Aug. 7, 2003) (on file with author).

[13] This essay is written in September of 2003. Next month Shapiro's portrait will

Over the years, many hundreds of words have been devoted to extolling this exemplary public servant. But no extoller has said it better than her friend and senior partner at Dechert, LLP, Robert M. Landis, speaking to the court on September 29, 1978, the day Norma Levy Shapiro ascended the bench: "[W]e see before us a person of breadth of understanding; of sensitivity and compassion; pragmatic in the way one should be in public affairs; rigorously disciplined in scholarship and with an innate sense of judgment and human wisdom. Surely Norma Shapiro will be a many-splendored Judge."[14]

be presented to our court. By the time this issue of the *Law Review* appears, later this fall, it is altogether likely that fresh bushels of honors will have descended on our so-very-deserving colleague.

[14] Administration of the Oath of Office as Judge of the United States District Court for the Eastern District of Pennsylvania to Norma Levy Shapiro, Esq. (Sept. 29, 1972), at 22 (on file with author).