

*Self-appointed advocates for crime victims like CNN's Nancy Grace (above left) and for "ordinary Americans" like Fox News' Sean Hannity (top center) and Bill O'Reilly (right) have vilified 23-year-veteran District Judge Edward Cashman (center) for the sentence he imposed in the case of State v. Mark Hulett. Many of the facts on which they have based their attacks have been far from the truth.*

## **Anatomy of a Smear: How Poor Reporting Trashed a Vermont Judge**

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BURLINGTON - It began with an inaccurate local television news report, with the errors repeated by Vermont print and broadcast media. The story was quickly picked up by Internet bloggers and right-wing talk radio and soon reached at least three sensationalist national cable shows. Within a week, bloggers were posting ever more extreme comments, calling for vigilante action against a longtime Vermont judge and posting his home address and phone online. State politicians jumped at the chance to be on national television, repeating the errors and adding to them. Nationwide, there were calls for boycotts of Vermont if the judge were not removed from the bench. Both the Republican governor and the Democratic Speaker of the House joined in condemnation of the judge. As this issue goes to press, the House is planning to vote on a resolution asking the judge to resign.

Only a few voices were heard on the other side: a couple of legislators, a former President of the Vermont Bar Association, an alternative press columnist and a few lawyers. Then the former Chief Justice of the Supreme Court sent an op-ed from Germany defending the judge, the current President of the Bar Association issued a statement, and the transcript of the judge's sentencing hearing was released. For those who took the time to read the transcript, it became clear that the whole controversy had been based on serious mistakes of fact.

### **The Initial Report**

The first coverage of Judge Edward Cashman's sentence in the case of *State v. Mark Hulett* was on the January 4 6 p.m. News on WCAX TV, which reported that "there was outrage . . . when a Vermont judge handed out a 60-day jail sentence to a man who raped a little girl many, many times over a four-year span starting when she was seven." The news anchor stated that "the judge said he no longer believes in punishment."

After a sound bite of Deputy States Attorney Nicole Andreson advocating an 8- to 20-year sentence for Hulett because "punishment is a valid purpose," correspondent Brian Joyce, who had attended the hearing, reported that Judge Cashman declared that "he has learned that punishment just does not work." Joyce said the judge was "more concerned that Hulett receive sex offender treatment as rehabilitation." Since the Department of Corrections classified Hulett as a "low-risk for re-offense," the defendant did not qualify for in-prison treatment, Joyce explained. "So the judge sentenced him to

just 60 days in prison and then Hulett must complete sex treatment when he gets out or face a possible life sentence.”

The report was incorrect in two major respects: the sentence the judge imposed and the statements he made about punishment. The defendant pled guilty to three crimes pursuant to an agreement that gave him the chance to withdraw his plea if he was sentenced to more than 90 days to serve. The crimes were two counts of aggravated sexual assault (based on admissions that the defendant had, over the course of four years starting when the child victim was 6 years old, licked the child’s vagina on multiple occasions and placed his penis in the child’s mouth at least once) and one count of lewd and lascivious conduct (based on an admission that the child had stroked his penis “quite a few times”). Judge Cashman imposed an incarcerative sentence of 60 days to 10 years to serve for the first count, a consecutive probationary sentence of 5 years to life on the second count and a consecutive probationary 2- to 5-year sentence on the third count. Thus the statement that the judge “sentenced him to just 60 days in prison” was incorrect.

As far as the judge’s position on “punishment,” the Joyce account was likewise wrong. What Judge Cashman actually said was “I keep telling prosecutors, and they won’t hear me, that punishment is not enough.” The judge said that he had “started out as a just deserts sentencer,” but he had “discovered it [retribution] accomplishes nothing of value, . . . doesn’t make anything better, . . . and costs us a lot of money.” He now realized a sentence must “solve a problem” so that “people are better off after the sentencing than they were before.”

The story of the 60-day sentence was repeated on Vermont Public Television Thursday morning in a spot promoting the WCAX News, and the transcript of the WCAX story appeared on the station’s website.

### **The Newspaper Accounts**

The *Burlington Free Press* ran an account of the case under the headline “Judge sentences man to 60 days for sexual assault on young girl.” The body of the story by Adam Silverman indicated that the judge and attorneys were concerned that the Corrections Department had decided it would not offer any sex-offender treatment for Hulett while he was in prison. While it did make clear that Cashman’s sentence “could incarcerate Hulett for the rest of his life if he fails to obtain counseling or otherwise follow instructions,” it made it seem like it was certain that the defendant would be freed in 60 days. There was no mention of the fact that the maximum portion of the incarcerative sentence was 10 years.

The Associated Press picked up the story, repeating the WCAX mistake that Cashman had given the defendant “a 60-day sentence.” Although in subsequent stories, the AP occasionally indicated that there was some longer sentence that might be triggered if Hulett did not pursue sex offender treatment, it often indicated that Cashman had “suspended all but 60 days of the prison term.”

## The Blogs

By the morning of January 5, the WCAX story had been posted on multiple blogs. The “Myopic Zeal” blog led with the story, which it headed “Judge Edward Cashman Doesn’t Believe in Punishment” and called “the most outrageous story of the month.”

Responses came fast and furious: “This robe-wearing joke is but one more example of activist judges gone nuts. Dollar to a donut he’s appointed and not elected,” one commentator wrote, adding that he was convinced “the boiling point is being reached by concerned Americans and sooner than later, Cashman and others of his ilk will be drummed out on their collective butts, robes and all.” Another contributor noted that “two hundred years ago a judge who would make such a ruling would have been tarred and feathered.” Almost all blog contributors agreed with the sentiment that the “judge should be permanently disbarred from the bench and have his license to practice [law] stripped.”

Soon, writers began predicting that the Cashman sentence would lead to a mass migration of pedophiles to Vermont. “Once all the pedfiles [sic] find this out they will move to Vermont, that will make this safer for my kids here in North Carolina!” one writer predicted. Cashman was lambasted as “the epitome of evil” and called a “lenient and liberal judge,” while other writers expressed hopes that Hulett might be killed while in prison. “Justice may yet be served,” one wrote. “Hopefully during those 60 days he is spending in jail, someone tips off the other inmates as to what this guys crime is and how lenient his sentence is.” This prediction was backed up by a writer who claimed to have worked in Vermont prisons; another posting from a writer self-identified as a probation/parole worker in Vermont warned that this sentence was not unusual, blasting the judge for his “ill informed opinion” about when Hulett should begin to receive treatment.

Another blog which promoted the WCAX story was freerepublic.com where postings were equally intemperate. “Any parent that does not move from Vermont immediately needs their head examined!” one declared. “More proof liberals do not care about children, although that’s what we keep hearing is the reason to take our money.” Appeals to vigilante justice were frequent: “Time to get a rope,” preached one writer. “Get two, one for hizzoner and one for the perp! Same tree, side by side would send a clear message to perps and judges!” echoed another.

Postings soon included links to the website of Governor James Douglas, so that complaints about Cashman could be submitted electronically. Another posting provided the judge’s home address and telephone number. Bloggers pushed for national coverage of the story. “Rush [Limbaugh] mentioned this case at the end of his show today, and I hope [Bill] O’Reilly comes on board when he returns on Monday . . . this is right up his alley,” wrote one. “My bet is O’Reilly will be all over this if he here’s [sic] about it,” another predicted.

## The National Media Response

The national media firestorm soon began. The Hannity & Colmes show on Fox on the evening of January 5 carried an account which repeated the mistakes from the WCAX story. "Keep an eye on Hannity's programs . . . he has been all over this since last night," a blogger wrote the next morning. "He just had a Vermont state rep on his show tonight, and point-blank asked how we could get this judge removed from the bench."

"I'm really glad that someone with some pull like Hannity is pissed, and wants to do something," another writer added. "I feel great that this kind of thing may actually work for us. O'Reilly and others got grass root support together over the Christmas thing, maybe Hannity can get us going over this, and who knows what we can accomplish next."

One of the main promoters of "the Christmas thing" - the defense of the right to say "Merry Christmas," which Fox News declared this fall was threatened by liberals - was John Gibson, whose book *The War on Christmas* became a bestseller. Gibson ran a segment on "Moronic Judges" January 6. "This story is so Ben & Jerry's I can't believe it really, really did happen in Vermont," Gibson began. He credited WCAX for the (mis)information that Judge Cashman had rejected the prosecutor's request for a 20-year sentence and instead imposed just 60 days because he "said he no longer believes in punishment." Gibson provided some sound effects and explained: "The sound you hear in the background is Howard Dean giving the judge a round of applause. . . . Evidently up in Vermont the Chubby Hubby ice cream finally got to the judge. 'Aww, heck. I've been sitting here for a quarter century sending people to jail and I still got people committing crimes. What's the point?'"

The O'Reilly Factor was soon on the story as well. O'Reilly, who recently settled a multi-million dollar sexual harassment suit brought by an employee who complained of years of degrading treatment, including repeated late night phone calls from O'Reilly describing his sexual fantasies about her, expressed outrage at the sentence, the judge and the State of Vermont in general. He ran video clips of Cashman, intoning "you may be looking at the worst judge in the United States." He sent crews to Vermont, one of which camped outside Cashman's home to try to get an interview with the judge. (Cashman invited the reporter inside for coffee and shared some thoughts, which the reporter posted on the Fox News website.)

Fox News gave the case the most coverage, but the story ran on other cable networks as well. CNN's Nancy Grace, a former prosecutor who describes herself as "an outspoken victims' rights advocate," declared "Judge Cashman, you are in contempt tonight." Grace repeated the mistake about the 60-day sentence, but pressed AP reporter Wilson Ring to be sure she had the facts right when it came to the age the child was when the first sexual offenses took place. "Some say the girl was six. Some say she was seven," she told Ring. "The abuse goes from four years to three years to five years. Set us straight, Wilson."

Ring said he had seen both reports and could not say for sure. Grace then told him that "a reporter in the courtroom" had quoted the judge saying to the people in the court

“I discovered punishment accomplishes nothing of value.” Grace said she understood that “the little victim’s mother left the courtroom in tears.”

“That’s my understanding, too,” Ring replied. When Ring began to talk about the judge’s view that “the best way to protect society is to get Mr. Hulett into sex offender treatment as soon as possible,” adding that “once he is out of jail, he would be under the strict supervision of the Department of Corrections,” Grace interrupted.

“Oh, please!” she said, switching to Alison Arngrim, a former “Little House on the Prairie” actress who now works with the National Association to Protect Children, who said that the Cashman sentence was not unusual. “At our website, you can read how this is an epidemic of judges handing out these kind of non-sentences.”

There was less coverage in the print media. One paper which weighed in was the Sun Myung Moon-financed *Washington Times*, which blasted Cashman “for sentencing a confessed child-rapist to just 60 days in prison,” describing his action as “knavery rarely surpassed.” The paper followed that up with an editorial calling for the judge’s removal.

### **The Politicians Seek the Spotlight**

On Friday, January 6, Republican lawmakers called a press conference at the State House to denounce Judge Cashman and call for mandatory minimum sentences for sex offenders. Sen. Wendy Wilton (R-Rutland), who for months has been pushing for a 25-year mandatory minimum sentence for sex offenders who victimize children, predicted that Vermont might become a haven for child molesters if her bill did not pass.

The Republicans were joined by Senate Judiciary Chair Dick Sears (D-Bennington), who announced that protecting the public was not a partisan issue. Governor James Douglas said he was “appalled by Judge Cashman’s decision to sentence an admitted child rapist to a mere 60 days in prison,” adding that “child molesters and sexual predators pose a real threat to our society and it astonishes me that a member of Vermont’s judiciary fails to recognize this.”

Rep. Kurt Wright (R-Burlington) drafted a resolution calling for the judge to resign, and Democratic Speaker Gaye Symington released a statement saying that she was “outraged” by Cashman’s decision. However, she suggested that having the Legislature call for resignation based on a single decision “would overstep the limits of legislative authority and violate the principles of the separation of powers.”

Defenders of the judge were few. A rare exception was Vince Illuzzi, a Republican who serves as Essex County prosecutor as well as a senator from Essex-Orleans. In press interviews, Illuzzi pointed out that mandatory minimum sentences have unintended consequences: fewer plea agreements and often fewer convictions. When those remarks were posted on some of the blogs, Illuzzi began to get a flood of angry e-mails from around the country. “Call my office, Illuzzi,” wrote a man who claimed to be a doctor. “For free, I’ll surgically remove your head from your anal cavity. Jackass.”

In response to an e-mail from an angry Ohioan, Illuzzi wrote: “Although the sentence was perhaps on the light side, I can see what Judge Cashman was thinking. He was taking the long view - get the offender in sex offender treatment so he doesn’t do it again.” The Ohioan e-mailed back: “My sincere apologies to you sir. You are obviously taking this very seriously and I respect that immensely. I sent the original email to all 129 members of the house and to your fellow 26 senators and you are the ONLY one that has responded! I don’t need to agree with your position to greatly respect your diligence.” [An op-ed by Illuzzi appears on page 9.]

When Rep. Michael Kainen (R-Hartford) expressed the view that perhaps much of the furor was caused by the mistakes in the original reporting of the story, he was promptly vilified in blogs as a “Jeffords-style Republican” who the “liberal media found to support the wacko judge.”

The most outspoken of the politicians were invited to be on national television. Rep. Wright appeared on Hannity & Colmes on Fox, inaccurately quoting Judge Cashman as saying “I no longer believe in punishment” and promising to work to get him to resign. That was not good enough for Hannity, however. “Here’s the more important issue, Representative,” the co-host said. “You’ve got to remove him. I have read that there’s impeachment possibility out here. This is not about, you know, trying to get him to resign, because he clearly said he’s not going to. The legislature of Vermont must take affirmative steps to remove this man from office. Will you do that?”

Wright promised to work on the resignation attempt first, but said he was having trouble getting Democrats to sign on. “Then let the voters know that this guy is letting a rapist out in their midst, and he’s circumventing the law, and he’s ruling by judicial fiat and it’s beyond outrageous,” advised Hannity.

“This guy has got to go,” Sen. Wilton said on the O’Reilly show. “People believe he has flipped his lid.”

## **A Few More Defenders**

A few Vermont lawyers tried to speak up for Judge Cashman and the principle of judicial independence. Former Bar Association President and Probate Judge Chet Ketcham tried for days to get a message to O’Reilly that “Judge Cashman is courageous and correct,” adding that “Vermont youth are best protected by the likes of Judge Cashman.” The e-mails were not delivered. “Either I do not know how to use the computer or they only accept e-mails from premium members,” Ketcham said in frustration. “I do not intend to pay to become a premium member and would not even do so for free.”

Current VBA President James Gallagher wrote an op-ed in defense of Cashman and in praise of judicial independence. [It appears on page 9 of this issue.]

From Germany, former Chief Justice Jeffrey Amestoy sent an op-ed to several Vermont newspapers. He questioned why “at a time when what may be the largest

corruption scandal in the history of the United States Congress is unfolding, a talk show host conveniently targets a respected, incorruptible Vermont judge.” He challenged the notion that “we ought to be outraged by the character of a conscientious judge who honestly did what he thought was best in a difficult case, but indifferent to the character of congressmen who sold their consciences to the highest bidder.” He concluded: “Give me the ‘worst judge in the USA.’ On his worst day, he has something to teach the rest of us about conscience, character, and courage.”

Amestoy noted that the ideal of judicial independence, a foundation of the American legal system, is “easily honored in the abstract,” a theme echoed by Middlebury lawyer Peter Langrock in a letter to the *Rutland Herald*. “A judge should make a decision as to what he or she believes justice requires and not upon what is politically popular,” Langrock wrote.

The *Herald* itself editorialized that Cashman’s sentence of Hulett was more protective of the public than would have been one sending him to jail for years without treatment. That led to attacks on the *Herald* by bloggers. “Many newspapers are defending Cashman, including the loathsome *Rutland (Baghdad) Herald*,” one wrote, adding “I have been in the offices of the Herald: full of conservative-bashing/man-hating women that resemble Eleanor Cliff and Helen Thomas.”

A critical analysis of the controversy was published in *Seven Days* in a column by Peter Freyne, who also appeared on Vermont Public Television’s Vermont This Week program. At the Governor’s press conference earlier in the week, Freyne had challenged Douglas for playing along with the O’Reilly attack. Douglas defended his position, saying that a judge who said he did not believe in punishment should think about resigning.

### **All Cashman, All the Time**

O’Reilly continued to carry the story every night on his show and was furious about the lack of support he was receiving from the Vermont media. “Most Americans understand that sentence and the attitude behind it is insane, but not the print media in Vermont,” O’Reilly told viewers. “Associated Press reporter Christopher Graff actually wrote a flattering piece this week on Cashman. The *Bennington Banner* said people like me who criticize Cashman are ‘opportunistic.’ But the absolute worst is *The Rutland Herald*.”

In another broadcast, O’Reilly complained that “Judge Cashman should have been gone last week, but so far no Vermont official has moved against him. His boss, Superior Court Judge Amy Davenport, who could transfer him to civil court, has refused to do so. Also former Vermont Chief Justice Jeffrey Amestoy is praising Cashman, saying he’s competent and caring. Unbelievable.”

On another night, O’Reilly complained that “the Vermont media continues to prop up Cashman. And a program on Vermont Public Television criticized me over the weekend. The legislature is dithering. And although Gov. Jim Douglas has called for

Cashman to quit, he has done nothing else.” O’Reilly wondered why there were no public demonstrations against Judge Cashman. “Where are activists Ben & Jerry who constantly scream about human rights? Where’s former Gov. Howard Dean? Sens. Jeffords and Leahy? Where’s socialist congressman Sanders?” O’Reilly began pushing for a boycott of Vermont. He warned one guest: “The state of Vermont’s never going to recover from this. Ever. Unless Cashman is removed. People will not go there. They will not buy your products. Your state will have a stigma forever. People will remember. This isn’t going away.”

## **What Lies Ahead**

Cashman issued a 14-page order describing in detail the sentence and his rationale for it. [It appears at page 46 of the *Trial Court Reporter*.] The transcript of the sentencing hearing was also released, which made clear that the judge had never said he “did not believe in punishment.” The State moved for sentence reconsideration, calling Cashman’s sentence “illegal;” that motion will be heard after defense attorney Mark Kaplan has a chance to respond. Corrections Commissioner Rob Hoffman promised to “spend a lot of resources on this case to see what latitude we have to hold this gentleman longer.” Human Services Secretary Mike Smith announced that the State will now provide treatment behind bars to “low risk” sex offenders like Hulett, who up until now have been forced to sit in prison - usually out of state - for their minimum sentences before being released on furlough and receiving their first treatment.

And at the State House, proposals for longer sentences are considered at the same time that lawmakers struggle to find a way to pay for the soaring cost of handling the existing Corrections population and to figure out why the turnover among first-year Corrections employees is close to 40%.