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Remarks: St John's Law Review Alumni Dinner

Roger J. Miner '56

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St. John's Law Review Alumni Dinner
Hotel Inter-Continental
New York City
Wednesday, March 23, 1994
7:30 P.M.

I.

Jackie and I thank you for your hospitality and your many kindnesses throughout the evening. I am happy to have this opportunity to address such a distinguished group of men and women -- those who have served and those who now serve as members and editors of the St. John's Law Review and those who are members of the law school faculty. My congratulations and sympathies to the new Editorial Board as you embark on your new duties. You follow in a great tradition and your responsibility is a heavy one. But you have the confidence of your peers, and I am sure that you will do an excellent job because you follow in the path of excellence.

I have a special affinity for the St. John's Law Review. As Chairman of the Second Circuit History Committee, I worked closely with the editors and staff in the production of Volume 65, No. 3, Summer 1991. That was the symposium issue celebrating the centennial of my court, the United States Court of Appeals for the Second Circuit. I was tremendously impressed by the student editors and staff, by their professionalism, their courtesy and their can-do attitudes. The History Committee remains grateful to Professor Alexander, a good friend and great authority on the federal courts, and to Professor Cavanaugh, who provided a great piece on Antitrust in the Second Circuit for the

centennial issue. The faculty advisors to the St. John's Law Review are the very best. And so is the Law Review itself.

According to the 1992 Chicago-Kent survey, it ranks among the top journals in the nation, based on the frequency of its citation in other journals.

I am privileged to have a number of friends who are or were members of the St. John's Law School faculty -- my colleagues, Professors McLaughlin and Pratt; Professor Ed Re, that distinguished academic and former judge, with whom I was privileged to sit on several occasions; Professor Pierce, spouse of my colleague, Larry Pierce; Margaret Bearn, former Assistant Dean; as well as Professors Alexander and Cavanaugh. Through these and other friends on the faculty as well as through professors who have become known to me by their scholarly reputations and achievements, I have easily formed the conclusion that the St. John's law faculty is as strong as any in the nation. Those who study law at St. John's are fortunate indeed.

The unifying theme of my remarks these evening is language. In connection with that theme, I shall touch briefly on the language of lawyers in the courtroom, the language of law reviews and law review editors and the language of the public trial guaranty of the United States Constitution.

II.

First, the language of lawyers in the courtroom. In the argument of appeals, according to my experience as one constrained to listen to appellate arguments, lawyers frequently

are unintelligible. How much worse it is for the trial judge, who must listen not only to legal arguments but to confused factual arguments that lawyers make to juries. By way of illustration, I shall quote from an opening statement that I found in a trial transcript submitted on an appeal that was before me a couple of months ago. In this part of his opening statement to the jury, defense counsel attacks the chief government witnesses in the following language:

The evidence will show that Hon Yee-Chau is a drug dealer.

The evidence will show, we can't make it disappear, the evidence will show, evidence, this man, he ain't got no conscience. A drug dealer. He ain't got no conscience. A drug dealer. He ain't got no conscience.

The evidence is going to show, after he takes that stand, that this drug dealer with no conscience, he's a liar.

The evidence will show, based on the cooperation agreement, he had a range of punishment from five years to 40 years in jail on this planet.

The evidence will show he is going to get some type of departure where he may or may not do less than five years.

The same attorney in the same case, according to the transcript, began his summation with the following appeal to the hearts and minds of the jurors:

The awesome majesty that has become the American bald eagle, yet, you must render unto Caesar only what justly belongs to Caesar, and it was the intention of our founding father

that you use this rendition and you
temper it with reasonable doubt.

But the language of lawyers in the courtroom reaches its nadir in
the imprecise and sometimes incomprehensible questions put to
witnesses: The responses to such questions often are
devastating. Take these examples from actual transcripts of
trial:

- Q. What happened then?
A. He told me, he says, "I have to kill you because you can identify me."
Q. Did he kill you?
A. No.
- Q. Now I am going to show you what has been marked as plaintiff's Exhibit No. 2 and ask if you recognize the picture.
A. John Fletcher.
Q. That's you?
A. Yes, sir.
Q. And you were present when the picture was taken, right?
- Q. Now, Mrs. Johnson, how was your first marriage terminated?
A. By death.
Q. And by whose death was it terminated?
- Q. What is your name?
A. Ernestine McDowell.
Q. And what is your marital status?
A. Fair.
- Q. Are you married?
A. No, I am divorced.
Q. What did your husband do before you divorced him?
A. A lot of things that I didn't know about.
- Q. At the time you first saw Dr. McCarthy, had you ever seen him prior to that time?
- Q. Mr. Jones, is your appearance this morning pursuant to a subpoena which was served upon you?
A. No. This is how I dress when I go to work.
- Q. And lastly, Gary, all your responses must be oral. Okay? What school do you go to?
A. Oral.
Q. How old are you?
A. Oral.
- Q. Do you have any sort of medical disability?
A. Legally blind.
Q. Does that create substantial problems with your eyesight as far as seeing things?
- Q. Are you qualified to give a urine sample?
A. Yes, I have been since early childhood.

- Q. Was there some event, Valerie, that occurred which kind of finally made you determined that you had to separate from your husband?
- A. Yes.
- Q. What did he do?
- A. Well, uh, he tried to kill me.
- Q. All right. And then you felt that that was the last straw, is that correct?
- Q. As you were driving your car just before the accident, where was your right foot located?
- A. It was located at the end of my right leg!
- Q. Doctor, did you say he was shot in the woods?
- A. No, I said he was shot in the lumbar region.
- Q. Do you recall approximately the time that you examined the body of Mr. Edgington at the mortuary?
- A. It was in the evening. The autopsy started about 8:30 P.M.
- Q. And Mr. Edgington was dead at that time, is that correct?
- Q. James stood back and shot Tommy Lee?
- A. Yes.
- Q. And then Tommy Lee pulled out his gun and shot James in the fracas?
- A. No sir, just above it.
- Q. Do you know how far pregnant you are right now?
- A. I will be three months November 8th.
- Q. Apparently then, the date of conception was August 8th?
- A. Yes.
- Q. What were you and your husband doing at that time?
- Q. What doctor treated you for the injuries you sustained while at work?
- A. Dr. J (name omitted).
- Q. And what kind of physician is Dr. J.?
- A. Well, I'm not sure, but I remember you said he was a good plaintiff's doctor.
- Q. Is there somebody in the gang called "Insane"?
- A. Yeah.
- Q. Is there a Big Insane?
- A. Yeah.
- Q. Is there a Little Insane?
- A. Yeah.
- Q. You don't happen to know their Christian names by any chance, do you?
- A. Their Christian names?
- Q. Yeah, like Bill, Charlie, you know Fred?
- A. Perfectly honest, I never knew they was Christian.

- Q. You claim that you injured your nose in the accident?
- A. Yes.
- Q. Is that the same nose you broke as a child?
- Q. Did you say that you were alone in the car at the time of the collision?
- A. Yes.
- Q. Were you driving?
- Q. Have you ever been arrested?
- A. Not for anything worthwhile.
- Q. What do you do for a living?
- A. I help my brother.
- A. And what does your brother do?
- A. Nothing.
- Q. Isn't it true that you were working off the books during the period that you claim that you were totally disabled?
- A. Yes, but you can't prove it.

VOIR DIRE

- Q. Can you participate in an endeavor in which the ultimate result might be death by lethal injection?
- A. They do that up in Huntsville, don't they?
Yeah, I guess I could do it if it was on a weekend.
- Q. Can you tell us that you would follow the court's instructions regardless of what else happened during the course of the trial?
- A. Cognitively, yes. Rationally, yes. Emotionally, effectively, I don't know. Or perhaps effectively, yes, and rationally, no.

QUALIFYING A CHILD

- Q. Do you know what will happen if you tell a lie?
- A. I will go to hell.
- Q. Is that all?
- A. Isn't that enough?

EXPERT WITNESS

- Q. What is the meaning of sperm being present?
- A. It indicates intercourse.
- Q. Male sperm?
- A. That is the only kind I know.

III.

Let me now turn to the language of law reviews and law review editors. I long have held the opinion that law journals should be of use to the legal profession. I know that this is a radical idea, but I adhere to it nonetheless. In my humble opinion, your law journal ranks among those that are the most useful to the legal profession. Recent issues have dealt with topics that are helpful to lawyers and judges as well as academics -- the regulation of hate speech; the bonafide occupational qualification exception to the Age Discrimination in Employment Act; hazardous waste liability in bankruptcy proceedings; the liability insurer's duty to defend in environmental actions; and the survey of New York practice. Your symposium issues provide ready reference for the matters with which they are concerned -- the two examples that come to mind are the centennial issue dealing with the work of the Second Circuit, to which I previously referred, and the most current issue, which deals in the main with the enforcement of international human rights in domestic courts.

I suggest that much of what is written in law reviews is unintelligible and what is not unintelligible is boring and repetitious to the point of stupefaction. If I see the word "normative" in one more law review article, I shall scream! A great many articles are good for tenure applications and not much else. The language of the St. John's Law Review generally escapes my criticism in this regard. There is one article in a recent issue, however, that I have some doubts about. It is entitled "Ideology, Due Process and Civil Procedure." I never

knew that there was any ideology in how many days you have to answer a motion. The article includes the following language: "Conservative ideology, with its preference for rule formalism, has attempted to formulate civil procedure doctrine, to the extent possible, as a system of rigid rules, while liberal ideology, with its characteristic skepticism about rules, has preferred to construct doctrine utilizing flexible standards." I do not think that this statement is true, but even if it is, so what? The following language also appears in the article: "[N]either liberals nor conservatives have adhered consistently to either a broad or a narrow reading of the Due Process Clause, but have read it in different ways dependent upon the setting." I guess no one can argue with that language, because it says nothing. The article just does not pass my usefulness test. It is written by a professor, albeit not a St. John's professor and illustrates a common failing of the modern law professoriate -- the teaching of law by classifying the work of each member of an appellate court rather than by identifying the legal doctrine established by the court as a whole.

I well recall the lead article of the first issue for which I was responsible as Managing Editor of my law review. Almost forty years have passed since that article first came into my hands. It was written by that great lion of American law, Roscoe Pound, then Dean Emeritus of Harvard Law School. Entitled "The Judicial Process in Action," it came to us in a form all too familiar to law review staffers -- all messed up and with much cite and substance work required. Many of the incomplete footnotes referred to original French and German sources. "The

Judicial Process in Action" -- I have returned to that article time and time again during the last forty years -- not because it has always remained interesting, informative and timely -- not because it has provided me with valuable insights bearing on my work as a judge -- and not because it is a great classic of legal literature. I have returned to that article repeatedly over the course of four decades because I never have understood the damn thing!! Nobody understood Roscoe Pound; that is why he was so great. I ask you to note the texture and profundity in the language of this aphorism created by the great Pound: "Law must be stable and yet it cannot stand still." Is that a useful statement or what?

I also remember the first student note I was responsible for editing. The note seems strangely out of date, since it revolved around a 1954 ruling of a Cook County, Illinois Superior Court to the effect that the fertilization of a woman with the sperm of a man other than her husband constituted adultery and that the resulting child was illegitimate. The medical technique then was known as artificial insemination. The note has stuck in my mind all these years because I remember the first line of the piece as it was handed in. It read: "Artificial insemination has only lately come into the public eye." I immediately saw the need for some editing on the first line.

The language of law review editors stands in a class by itself. Editors-in-Chief consider themselves the ultimate language mavens. Those who edit my law review articles often think, wrongfully, that their language is superior to mine. When editors become law clerks, this wrong-headed thinking is

perpetuated. One of my present law clerks is Chris Malloy, a former Editor-in-Chief of the St. John's Law Review. I caught him trying on my robe the other day. He said it was similar to the one he wore as Editor-in-Chief but that he also had a crown when he served in that capacity. Despite the unbridled egotism of Editors-in-Chief, the most important job on the law review is Managing Editor, but I may be somewhat prejudiced in this opinion. Chris is doing a fine job for me but sometimes, while listening to him expound, I am reminded of the biblical story of Methuselah. The Bible says that, at the end of his days, Methuselah leaned upon his staff and died.

But it is in their applications for clerkship that the language of law review editors and staffers is at its finest. This is the language of persuasion. I receive in the neighborhood of 250 clerkship applications each year and have culled out some actual résumés submitted by members of various law reviews throughout the country. Here is persuasive language at its very best:

[Read student résumés]

The language of the law professoriate is a topic for another day, but I do want you to hear a letter of recommendation from one professor.

[Read law professor letter]

IV.

Finally, I address the language of a particular constitutional provision and bring you my message for the evening. The language of the Sixth Amendment clearly provides the accused with the right to a public trial. Those who wrote

the Constitution and the Bill of Rights were well aware of the benefits of a public trial, and this aspect of the Sixth Amendment provoked little debate when it was proposed. Our accepted practice of open courtrooms had its origins in the English Common Law. Blackstone wrote the following:

This open examination of witnesses, viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal.

Blackstone also wrote that the requirement for a judge to make his rulings in public "must curb any secret bias or partiality that might arise in his own breast."

The American colonies early on provided for public trials. For example, the Pennsylvania Frame of Government, written by William Penn in 1682, included the guaranty "[t]hat all courts shall be open, and justice shall neither be sold, denied nor delayed." By the time of the American Revolution, the right to a public trial was a generally accepted practice in the colonies. Following the ratification of the Sixth Amendment in 1791, most of the original states as well as those subsequently admitted to the union required that all criminal trials be open to the public. Nevertheless, the Supreme Court has held that the Sixth Amendment does not confer upon any member of the public or the press the right to be present at a criminal trial. This seems to fly in the face of history, language, logic and the intention of the Framers of the Sixth Amendment. To say that the right to a

public trial can only be exercised by the accused is to burden the accused with the chore of seeking access to his own trial on behalf of others who are entitled to access in any event. I do not think the Sixth Amendment means to impose this burden. All those who seek access should have standing under the Sixth Amendment. More historically correct is the New York Judiciary Law provision, which does not establish public trial as a right of the accused. It provides that, with certain exceptions, "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same."

But not to fear. The Supreme Court has devised a way to guarantee public trials, but not under the Sixth Amendment. The Supreme Court has chosen the First Amendment as the basis for access, holding in 1980 in Richmond Newspapers v. Virginia that the right to attend criminal trials is "implicit" in the First Amendment guarantee of freedom of speech and of the press. Why one has to find a right implicit in one amendment when it is explicit in another is beyond me. But when dealing with the Supreme Court, you take what you can get. The right of the public and the press to have access to criminal trials by virtue of the First Amendment was clarified and strengthened in Globe Newspaper Co. v. Superior Court in 1982. It seems clear at this point that the constitutional right of access extends to civil trials as well.

The Supreme Court has taken note of the great importance of public trials in fostering the free discussion of governmental affairs and in protecting the competence and integrity of the judicial process. Openness gives assurance that the proceedings

are conducted fairly, it helps to discourage perjury and misconduct and it assists in eliminating decisions based on secret bias or partisanship. Public trials come to the attention of unknown witnesses, who may then come forward with important evidence. A panel of my court has noted "the victim's and the community's interest in seeing that offenders are brought to account, and the public interest in knowing that fair standards are followed . . . and that variance from established norms will come to light." But most of all, as I see it, openness educates the public in the operation of our legal system, in the importance of the rule of law and in the place of the legal profession in the protection of the rights of the citizenry.

And how is this right of access to be realized in this era of multi-hour television viewing? By televising trials as well as the arguments of appeals, of course. In Chandler v. Florida, decided in 1981, the Supreme Court gave up a whole line of precedent and said that it was okay to have radio, television and still photographic coverage in state courts. A number of states now have provided for that coverage and we have an experimental program now in progress in the federal courts. My court is part of the experiment as is the Southern District. I can tell you that we have no problem with the civil trials and appeals that are now being covered. A federal rule presently prevents the coverage of criminal trials. I note that New York is in the process of a debate over whether to extend its cameras in the courtroom experiment.

Let me give you my "take" on this matter. I think that there should be a strong presumption in favor of television

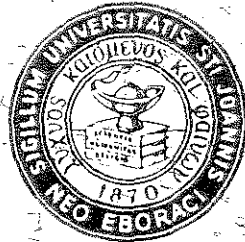
cameras in the courtroom in both civil and criminal cases. The technology is far advanced, and the cameras are most unobtrusive. There is no reason why anyone in the court would be any more self-conscious with the camera lens facing him or her than he or she is in facing any spectator in the courtroom. I think that all trials should be open to television and that all measures short of excluding the cameras should be first explored. Cases involving sexual assault, children of tender years, trade secrets and the like can be dealt with without closing the courtroom altogether. But wherever the courtroom is open, there the cameras should be allowed.

As to the charge that the cameras will cover only the sensational, I say so be it. I think that the average citizen gets a better appreciation for the judicial system and for the lawyers and judges who make it work even through the televising of sensational cases. Yes, one of the reasons for the bad image of lawyers and judges is that nobody understands what we do. I think that televising the guilty plea of Tonya Harding demonstrated how methodical and careful we are about permitting a guilty plea. I think that the trial of Lorena Bobbitt demonstrates what juries are confronted with in assessing the testimony of witnesses and arriving at the truth. I think that the trial of the Menendez brothers showed that lawyers and judges and jurors are just hardworking men and women who are doing their best to achieve that illusive goal of justice. Of course, these are sensational cases, but they illustrate as well as any what it is that we do. It is essential that justice is seen to be done, and television lets the citizenry see our justice system in

action. The court TV network is the best thing that ever happened to our profession because it inspires confidence in our judicial processes.

And one more thing while I am worked up about the issue. Let's get the cameras into the Supreme Court! Is there any possible reason that you can think of not to televise Supreme Court arguments? Is there any possibility of prejudice to anyone? And wouldn't televising those arguments provide the greatest civic lessons the nation could have? There are some indications that the Court considers that televised sessions would be an affront to its dignity. I think that is ridiculous. The image of the Court suffered badly when the Court threatened Professor Peter Irons with a lawsuit for releasing the audiotapes of oral argument. Now, fortunately, those tapes are available to all. What we need, however, is live TV coverage of the Court. A single TV camera in that courtroom during oral arguments would be completely unnoticed. As Chairman of the Second Circuit Cameras in the Courts Committee, I am convinced that we have benefitted greatly and that no one has been disadvantaged by televising oral arguments in our court. The Supreme Court should also open up to TV without delay. Secrecy in government always has raised questions in the public mind. Let the sun shine in!

ST. JOHN'S LAW REVIEW



SYMPOSIUM CELEBRATING THE CENTENNIAL OF THE SECOND CIRCUIT COURT OF APPEALS (1891-1991)

- "THE MORE THINGS CHANGE . . ."
CELEBRATING THE SECOND CIRCUIT CENTENNIAL
THE CENTENNIAL CELEBRATION OF THE SECOND CIRCUIT
COURT OF APPEALS
CIVIL FORFEITURE IN THE SECOND CIRCUIT
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THE JUDGE EDWARD D. RE DISTINGUISHED LECTURE SERIES SYMPOSIUM ON HUMAN RIGHTS BEFORE DOMESTIC COURTS

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SUMMER 1993

NUMBER 3

Hon. Roger J. Miner

Judge Miner was appointed United States Circuit Judge for the Second Circuit on July 22, 1985 and entered on duty on August 2, 1985. He received a B.S. degree from the State University of New York and in 1956 he received his LL.B. (cum laude) from New York Law School, where he served as Managing Editor of the Law Review. He held the rank of Captain, Judge Advocate General's Corps, United States Army, and served on active military duty from 1956-1959.

Prior to his appointment, Judge Miner was Corporation Counsel for the City of Hudson, New York, 1961-1964; Assistant District Attorney, Columbia County, New York, 1964; District Attorney, Columbia County, 1968-1975; Justice of the New York Supreme Court, Third Judicial District, 1976-1981; and United States District Judge for the Northern District of New York, 1981-1985.

Judge Miner is an Adjunct Professor of Law at New York Law School and a member of its Board of Trustees. He is a member of the Columbia County, New York State and American Bar Associations, the Association of the Bar of the City of New York, the American Judicature Society, the American Law Institute, several historical societies and numerous civic and fraternal organizations. He holds honorary degrees from Syracuse University (1990) and New York Law School (1989).

St. John's University Law Review
Alumni Association

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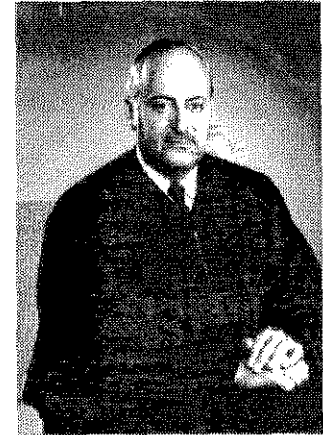
*Wednesday March 23, 1994
Hotel Inter•Continental
48th Street East at Park Avenue
New York City*

*Honoring the
Seniors of the Law Review*

*Honoree and Guest Speaker
Hon. Roger J. Miner
Judge of the United States Court of Appeals
for the Second Circuit*

*Honoree
and Guest Speaker*

Hon. Roger J. Miner
*Judge of the United States
Court of Appeals*



*Wednesday,
March 23, 1994*

ST. JOHN'S UNIVERSITY SCHOOL OF LAW

