

1985

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### Recommended Citation

Miner '56, Roger J., "The Duty to Criticize the Courts (I)" (1985). *Lawyers and the Legal Profession*. 2.  
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## CRITICIZING THE COURTS: A LAWYER'S DUTY

Roger J. Miner\*

In observing the work of lawyers in the courts in which I have served, as well as in other courts, I have been impressed generally with the service that the bar has rendered in the representation of clients. I have not been quite so impressed, however, with the performance of the bar in the discharge of its duty to society as a whole. It is the willingness to accept this public responsibility that distinguishes the bar as a profession. The value of the calling is diminished to the extent that any one lawyer shirks his or her professional obligation of service to the community.

There are many duties implicated in the concept of public responsibility -- the duty to undertake the representation of indigent clients without charge<sup>1</sup> (if more lawyers performed this duty, perhaps the public expense for such representation could be greatly reduced or eliminated); the duty to see that able and honest men and women are appointed or elected as judges;<sup>2</sup> the duty to aid in the improvement of legal education;<sup>3</sup> the duty to maintain the competence and integrity of the bar,<sup>4</sup> and to disclose violations of the rules of professional conduct;<sup>5</sup> the duty to set an example and maintain public confidence by avoiding even minor violations of law;<sup>6</sup> the duty to seek legislative and

administrative changes to improve the law and the legal system;<sup>7</sup> and the duty to educate the public<sup>8</sup> and to protect it from the unauthorized practice of law.<sup>9</sup>

In my opinion, one of the most important societal duties of lawyers is the duty to criticize the courts. It is my premise that informed criticism of the courts and their decisions is not merely a right but an ethical obligation imposed upon every member of the bar. I also believe that judges should not respond to such criticism, directly or indirectly, since judicial response dampens the enthusiasm of the bar and disserves the public interest.

There is a Canon in the Code of Professional Responsibility that instructs lawyers to assist in improving the legal system.<sup>10</sup> The Ethical Considerations relating to that Canon observe that lawyers are especially qualified to recognize deficiencies in the system and to initiate corrective measures.<sup>11</sup> They encourage the legal profession to support changes in the law when existing rules eventuate in unjust results.<sup>12</sup> The Preamble to the new Model Rules of Professional Conduct adopted by the American Bar Association urges that lawyers should employ their knowledge to reform the law.<sup>13</sup> In my opinion these admonitions speak to a duty on the part of lawyers to identify and discuss incorrect actions by the courts, subject only to the requirement that the

criticism be impelled by a good-faith desire for improvement in the law and the legal system.

Malicious or false statements about a judge or disruptive or contemptuous conduct in the courtroom, of course, never can be countenanced. I have kept with me for nearly thirty years a case I read in law school regarding a penalty imposed for behavior of this type. The decision is taken from the ancient English Reports and is one of those collected by Sir James Dyar, sometime Chief Justice of Common Pleas. It is reported as follows:

RICHARDSON, Chief Justice of C.B. at the assizes at Salisbury in the summer of 1631 was assaulted by a prisoner condemned there for felony, who after his condemnation threw a brick bat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn . . . against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was himself immediately hanged in the presence of the Court.<sup>14</sup>

It seems to me that the judge overreacted somewhat in spite of the provocation. Of course, there are those today who would consider tossing a brick to be "protected expression." I do realize that occasionally it is necessary for a lawyer to bite his or her tongue when in the presence of some particularly arbitrary tyrant in a black robe. My father, who has been practicing law for sixty years, holds in the highest regard the lawyer who made some intemperate remark during a long and heated argument with a judge. When the judge shouted: "Counsellor, you

have been showing your contempt of this court," the lawyer responded: "No, your honor, I have been trying to conceal it."

While lawyers generally feel free to criticize the state of the law in relation to rules of court, statutes and even the Constitution itself, there is a noticeable reluctance to criticize judge-made law, specific judicial decisions or individual judges. Yet, the public responsibility function of the bar is just as implicated in the latter as in the former. Why the distinction? I think that the answer lies in the unfortunate, but well-grounded, fear on the part of attorneys that affronts to tender judicial sensibilities may result in unnecessary antagonisms, disciplinary action or worse. For example, in 1830, Judge James H. Peck of the United States District Court for the District of Missouri disbarred and imprisoned a lawyer for publishing a letter critical of one of his decisions.<sup>15</sup> Although this disgraceful episode led to an impeachment proceeding and caused Congress to curtail the summary contempt power of the federal courts,<sup>16</sup> echoes of the Peck incident were heard in a decision handed down by the Supreme Court in 1985. The decision reversed a six-month suspension from federal practice imposed upon Robert J. Snyder by the Eighth Circuit Court of Appeals for conduct said to be prejudicial to the administration of justice and unbecoming a member of the bar.<sup>17</sup> Snyder's difficulties stemmed from a letter he wrote to the

United States District Court for the District of North Dakota. The letter was written after the circuit court had twice returned his Criminal Justice Act fee application for insufficient documentation. In his correspondence, Snyder refused to provide further information, criticized generally the inadequacy of the fees authorized in similar cases, expressed his disgust at the treatment afforded him by the circuit and directed that his name be removed from the list of attorneys available for criminal defense assignments.<sup>18</sup> The district court judge, finding nothing offensive in the letter, and perceiving some merit in Snyder's criticisms, passed the letter on to the circuit. A three-judge panel of the circuit ultimately found that the statements, which Snyder refused to retract, were disrespectful, contentious and beyond the bounds of proper comment and criticism.<sup>19</sup>

In reversing the panel decision, then Chief Justice Burger wrote: "We do not consider a lawyer's criticism of the administration of the [Criminal Justice] Act or criticism of inequities in assignments under the Act as cause for discipline or suspension. . . . Officers of the court may appropriately express criticism on such matters."<sup>20</sup> The Chief Justice observed that the circuit court had acknowledged the meritorious nature of Snyder's criticism and, as a result, had instituted a study of the administration of the Criminal Justice Act.<sup>21</sup> In light of that observation, I believe that the Chief Justice missed an

excellent opportunity to comment on the attorney's duty to criticize the courts and the beneficial purposes served by the performance of that duty. Snyder's actions were well within the bounds of the public responsibility he assumed when he became a member of the bar. This is so because a lawyer is obliged not only to educate the public about the law, the legal system and the judges, but to inform the courts as well.

Justice Jackson once commented that "lawyers are the only group in a community who really know how well judicial work is being done. The public may rightfully look to them to be the first to condemn practices or tendencies which they see departing from the best judicial traditions."<sup>22</sup> Justice Brewer said: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism."<sup>23</sup> "I have no patience," said Chief Justice Harlan F. Stone, "with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."<sup>24</sup>

Some years ago, in answer to a contention that criticism of the Supreme Court and its decisions by the bar was unwise, Raymond Moley, the political analyst, wrote the following:

The bar in this instance is acting in its most significant role. A lawyer is something more than a plain citizen. He is by tradition and law an officer of the court and an agent of the government. To refrain from guidance would be to shirk the bar's responsibility, as a professional association, to the public and to government.

. . . .

The Court is a responsible, human institution. To elevate it above criticism would be to create a tyranny above the law and above the government of which it is a part.<sup>25</sup>

And so it is that when the Attorney General of the United States publicly criticizes certain decisions of the Supreme Court, as he has done in recent years,<sup>26</sup> he is acting in the highest traditions of the legal profession. By leading serious discussions of constitutional doctrine important to the citizenry and to the courts, he performs the public service encouraged by Moley and by Justices Jackson, Brewer and Stone. It ill behooves members of the bar to ridicule and abuse a fellow member of the profession for fostering the robust and uninhibited debate that is the hallmark of a free society. When Stephen A. Douglas denounced Abraham Lincoln for questioning the validity of the infamous Dred Scott decision, Lincoln replied:

We believe as much as [Mr.] Douglas (perhaps more) in obedience to and respect for the judicial department of government.

We think its decisions on constitutional questions, when fully settled, should control not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution, as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this.<sup>27</sup>

Lincoln was a great lawyer who understood well the public responsibility of the bar.

It has never been the place of a judge, however, to respond to specific criticism, and I think that it is unseemly for Justices of the Supreme Court to engage in public argument with the Attorney General or any other lawyer for the purpose of defending the position of the Court on one issue or another.<sup>28</sup> Such discourse not only detracts from the dignity of the court but also communicates an unwillingness to maintain the openness of mind so essential for the proper performance of the judicial role.<sup>29</sup> When the judiciary undertakes a point-by-point defense of criticism leveled by members of the bar, it discourages what it should encourage and protect. Even in the case of unfair and unjust criticism, the bench should remain silent, leaving to the bar its ethical obligation to come to the defense of the judiciary in such situations.<sup>30</sup> It long has been recognized that judges, "not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism."<sup>31</sup>

When Justice Brennan wrote in the Sawyer case that "lawyers are free to criticise the state of the law,"<sup>32</sup> he reserved no rebuttal time for the judiciary.

Let me hasten to add that there are numerous matters upon which judges can and should be heard -- matters affecting administration of the legal system, improvements in substantive and procedural law and ethical standards.<sup>33</sup> A judge also should teach and write about the law in an expository way, pointing to trends and changes in decisions already written and in legislation already adopted.<sup>34</sup> Judges should encourage debate about controversial constitutional and legal issues.<sup>35</sup> I have lectured and written about the public accountability of judges -- the need for judges to report to the citizenry about developments in the law and the legal system.<sup>36</sup> Others have advocated judicial participation in policy-making where matters affecting the judicial process are concerned. Judge Irving R. Kaufman, my colleague on the Second Circuit Court of Appeals, holds that "[j]udges may not merely express their views on matters within their judicial province, but have an obligation to do so in the public interest."<sup>37</sup> However this may be, there is no reason for judges to argue the merits of their decisions or views directly with their critics. It should always be remembered that judges have an unfair advantage in any debate with lawyers, because

judicial decisions -- at least until reversed, modified, distinguished or overruled -- are the last word.

The judiciary should assure the bar that critical comments of all kinds are welcomed. It should heed the message of Justice Frankfurter that "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."<sup>38</sup> The Justices of the Supreme Court and of every other court in the land must recognize, as did Frankfurter, that lawyers "are under a special responsibility to exercise fearlessness"<sup>39</sup> in criticizing the courts.

Without question, the judiciary is accountable to the public, just as any other public institution is accountable to the public. If judges are arbitrary, if their behavior is improper, if their decisions are not well-grounded in constitutional and legal principles, if their reasoning is faulty, the bar is in the best position to observe and evaluate the deficiencies, to inform the public and to suggest corrections. When lawyers engage in criticism of the courts for constructive and positive purposes, grounded in good faith and reason, the judiciary is strengthened, the rule of law is reinforced and the public duty of the bar is performed.

FOOTNOTES

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1. See Model Code of Professional Responsibility EC 2-25, 8-3 (1981) [hereinafter ABA Model Code]; Model Rules of Professional Conduct Rule 6.1 (1983) [hereinafter ABA Model Rules].

2. See ABA Model Code EC 8-6; ABA Model Rule 8.2 comment, para. 1.

3. See ABA Model Code EC 1-2; ABA Model Rules Preamble, para. 5.

4. See ABA Model Code Canon 1; ABA Model Rules Preamble, para. 5.

5. See ABA Model Code EC 1-4, DR 1-103(a); ABA Model Rule 8.3(a).

6. See ABA Model Code EC 1-5; ABA Model Rule 8.4 comment, para. 1.

7. See ABA Model Code EC 8-1; ABA Model Rules Preamble, para. 5, Rule 6.1.

8. See ABA Model Code EC 2-1 to 2-2, 8-3; cf. ABA Model Rule 7.2(a) comment, para. 1.

9. See ABA Model Code Canon 3; ABA Model Rule 5.5(b).

10. ABA Model Code Canon 8.

11. Id. EC 8-1.

12. Id. EC 8-2.

13. ABA Model Rules Preamble, para. 5.

14. Note, 2 Dyer 188b, 73 Eng. Rep. 416 (Michaelmas Term 1631); see also W.S. Holdsworth, A History of the English Law 391-93 (3d ed. 1947).

15. See generally A. Stansbury, Report of the Trial of James H. Peck (1833); Rieger, Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?, 2 Const. Commentary 69, 75-76 (1985); Nelles & King, Contempt by Publication in the United

States: To the Federal Contempt Statute, 28 Colum. L. Rev. 400, 423-31 (1928).

16. Act of March 2, 1831, ch. 99, 4 Stat. 487. See generally United States v. Reed, 773 F.2d 477, 485-86 (2d Cir. 1985); Note, Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle, 82 Mich. L. Rev. 90, 99-101 (1983).

17. In re Snyder, 105 S. Ct. 2874 (1985).

18. Snyder's offending letter is reprinted as an addendum to the circuit court's opinion. In re Snyder, 734 F.2d 334, 344 (8th Cir. 1984), rev'd, 105 S. Ct. 2874 (1985).

19. In re Snyder, 734 F.2d at 337.

20. In re Snyder, 105 S. Ct. at 2882.

21. Id. For a discussion of the Snyder decision, see Stewart, Are Lawyers Free to Speak Out About the Courts?, A.B.A. J., May 1985, at 81.

22. As quoted in Memorial Tribute to Justice Robert H. Jackson, 38 J. Am. Judicature Soc'y 96, 96 (1954).

23. Address by Justice David J. Brewer, Lincoln Day (Feb. 12, 1898), quoted in Bridges v. California, 314 U.S. 252, 290 n.5 (1941) (Frankfurter, J., dissenting); see Editorial, Shall We "Curb" The Supreme Court?, 41 J. Am. Judicature Soc'y 36 (1957).

24. Remarks of Justice Harlan Fiske Stone to Professor Thomas Reed Howell of Harvard Law School (Nov. 15, 1935), reprinted in A. Mason, Harlan Fiske Stone: Pillar of the Law 398 (1956).

25. Moley, Criticism of the Court, Newsweek, Mar. 16, 1959, at 100.

26. See, e.g., Shenon, Meese and His Vision of the Constitution, N.Y. Times, Oct. 17, 1985, at B10, col. 3.

27. Speech by Abraham Lincoln at Springfield, Illinois (July 17, 1858), reprinted in 2 The Collected Works of Abraham Lincoln 516 (R. Basler ed. 1953); see Fisher, Constitutional Speech by Members of Congress, 63 N.C.L. Rev. 707 (1985) (analyzing Lincoln's speech); see also Hall, Criticising the Judiciary, 43 Am. L. Rev. 917 (1909).

28. See, e.g., Taylor, Justice Stevens, in Rare Criticism, Disputes Meese on Constitution, N.Y. Times, Oct. 26, 1985, at 1,

col. 1 (discussing criticisms by Justices Stevens and Brennan); Editorial, The 20th-Century Justice, N.Y. Times, Oct. 15, 1985, at A30, col. 1; see also, e.g., Taylor, Who's right about the Constitution?---Meese v. Brennan, New Republic, Jan. 6 & 13, 1986, at 17.

29. See Code of Judicial Conduct Canons 2A, 3A(6) (1984) [hereinafter ABA Judicial Code].

30. See generally Gross, Judicial Speech: Discipline and the First Amendment, 36 Syracuse L. Rev. 1121, 1125-250 (1986).

31. ABA Model Code EC 8-6.

32. In re Sawyer, 360 U.S. 622, 631 (1959) (plurality opinion) (Brennan, J.).

33. See ABA Judicial Code Canon 4 & commentary; see also Advisory Comm. on Judicial Activities, Advisory Op. 50 (1977).

34. See ABA Judicial Code Canons 4(A), 5(A); see also Advisory Comm. on Judicial Activities, Advisory Op. 55 (1977).

35. See ABA Judicial Code Cannon 4 commentary.

36. See, e.g., Miner, Federal Courts at the Crossroads, 4 Const. Commentary \_\_\_\_ (1987); Miner, Victims and Witnesses: New Concerns in the Criminal Justice System, 30 N.Y.L. Sch. L. Rev. 757, 757 (1985).

37. Kaufman, Judges Must Speak Out, N.Y. Times, Jan. 30, 1982, at 23, col. 1.

38. Bridges v. California, 314 U.S. 252, 289-90 (1941) (Frankfurter, J., dissenting). See generally Note, Public Criticism of the Courts by Lawyers: A Problem in Legal Ethics, 16 Ala. L. Rev. 461 (1964); Comment, In re Erdmann: What Lawyers Can Say About Judges, 38 Alb. L. Rev. 600 (1974); Annotation, Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action, 12 A.L.R.3d 1408 (1967 & Supp. 1987).

39. In re Sawyer, 360 U.S. at 669 (Frankfurter, J., dissenting).