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Defending Judges, Standing Up for the Rule of Law

By Mark H. Alcott

There is nothing wrong with criticizing a judge's decision. Law professors do it, appellate courts do it, even bar associations do it. It is a healthy – indeed, essential – part of our legal process, and the ensuing dialogue strengthens the rule of law.

But when the criticism goes beyond the merits of the decision and degenerates into a personal attack on the judge's competence, integrity, patriotism or the like, it undermines the rule of law and becomes a threat to our democratic institutions. Judges have no weapons, no armies; they depend on their moral authority. Personal attacks undermine that moral authority and weaken our legal system, to our peril.

In any other context, the targets of such an attack would respond with a vigorous, robust defense of their conduct and the challenged decision. But judges don't. They can't. Why not? Because they are prohibited from doing so by their ethical code, as well as by custom and tradition.

The New York Code of Judicial Conduct provides, in Rule 100.3(B)(8):

> A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control.[1]

This rule has been interpreted by the New York State Bar Association as preventing judges from responding to criticism of their behavior on pending or impending matters.[2]

The obligation to respond on judges' behalf lies with the organized bar. Recognizing that judges cannot engage in rough and tumble civic debate, and cannot defend

themselves in the public square, the organized bar does so on their behalf.

The comments to Model Rules of Professional Conduct explicitly urge the bar to do so, saying in Comment 3 to Rule 8.2(a):

> To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

The role of lawyers in defending judges and courts derives from a combination of their role as officers of the court and the inability of judges to defend themselves. As the late Chief Judge Judith Kaye put it:

> [T]he fact is that judges today cannot and do not answer back, but hold up the banners of judicial dignity, judicial impartiality and judicial independence, and look to the bar to hold up the other end of those banners. The prevailing view is that a judge's defenses are "best left to the objectivity of a local, county or state bar association."[3]

> Moreover, even assuming that one or more of the males ran from the corner once they were aware of the officers' presence, it is hard to characterize this as evasive conduct. Police officers, even those travelling in unmarked vehicles, are easily recognized, particularly, in this area of Manhattan. In fact, the same United States Attorney's Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood. Even before this prosecution and the public hearing and final report of the Mollen Commission, residents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding the above events, had the men not run when the cops began to stare at them, it would have been unusual.[4]

These words quickly went viral – or the pre-internet equivalent thereof. A tidal wave of criticism engulfed the judge. Louis Materazzo, the president of the Patrolmen's Benevolent Association, suggested that Judge Baer "should be investigated," adding: "As long as there are judges like that, criminals will be running in the streets." Police Commissioner William J. Bratton said Judge Baer should recuse himself from cases involving police in the future.[5] Federal officials, including President Bill Clinton, joined these criticisms. White House Press Secretary Michael McCurry suggested that "if [Baer] did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation."[6] Bob Dole went further, saying "He ought to be impeached instead of reprimanded . . . If he doesn't resign, he ought to be impeached."[7]

Personal attacks undermine that moral authority and weaken our legal system.

The American Bar Association, the New York State Bar Association and state and local bars throughout the country have repeatedly stepped forward to perform this important duty – even when doing so has embroiled them in controversy. Some of the episodes have been widely publicized, including the following:

In 1996, Judge Harold Baer of the U.S. District Court for the Southern District of New York presided over what should have been a relatively routine suppression hearing. The defendants, observed late at night in a desolate part of Manhattan, were acting suspiciously, in the judgment of police officers. The suspicion was compounded when, after noticing the police officers, the defendants ran away. They were quickly apprehended. The officers then engaged in a search, found contraband and arrested the defendants.

The question before Judge Baer was whether the defendants' conduct – especially their rapid flight when approached by the police – was suspicious enough to constitute probable cause for the warrantless search of their car; or whether, on the other hand, the police engaged in an unreasonable search and seizure in violation of the Fourth Amendment, requiring suppression of the contraband they found.

Judge Baer found the search unreasonable. Fair enough. No one but those involved would have noticed. But his written opinion caused a sensation. Judge Baer opined:

Judge Baer was not allowed to give any public explanation or defense of his decision. His written opinion stood alone against the verbal onslaughts of the politicians, pundits and publicists. Although he ultimately vacated this decision, referencing briefly and obliquely the controversial language, he was unable to respond directly to his critics even then.[8]

But Judge Baer did not stand completely alone. The organized bar quickly stepped into the fray.

The Association of the Bar of the City of New York released a statement calling such personal attacks on a judge writing an opinion "pernicious."[9]

In addition, 26 bar associations released a full-throated statement of the profession's obligation to reject such attacks.

> We believe that in a democratic society fair, open and vigorous debate and criticism of judges and judicial

> decisions is necessary and appropriate. But these recent attacks have gone well beyond the criticism from which no judicial decision or judge should ever be immune. Rather they have been both intemperate and personal in nature. The corrosive effects of these attacks upon the judicial system and the society it serves cannot be overstated.
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> The leaders of this profession must resist the propagation of misinformation concerning the law and the legal process. We must be no less vigilant in resisting efforts to undermine the independence of the judiciary. To utilize the threat of sanction or removal solely to punish a judicial decision which is unpopular or, in retrospect, turns out to have been unwise, is unacceptable and incompatible with the preservation of a co-equal judicial branch of government.
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> Efforts by either the executive or the legislative branches of government to intimidate judges and thereby diminish the independence of the judiciary must not be permitted. Enhanced vigilance is particularly necessary under the New York State governmental structure wherein judges do not enjoy life tenure during good behavior, but rather must periodically submit to a process of reappointment or reelection.
>
> It is a responsibility of the members of this profession to act as guardians of those liberties which form the bedrock of a free society. We must, by our collective actions, show that liberty depends upon keeping separate the power of judging from the legislative and executive powers.[10]

The leaders of the bar did not feel compelled to defend the merits of Judge Baer's decision, with which many disagreed. But some did use the opportunity as a teaching moment, to explain the role of the courts, the separation of powers and the importance of an independent judiciary.

The American Bar Association assembled the ABA Commission on Judicial Independence and Separation of Powers. It released an extensive report that stressed the importance of judicial independence and included early suggestions about how bar associations can defend judges when attacked.[11]

Judge Shira Scheindlin, also of the Southern District of New York, became a target of comparable vitriol because of her involvement in a case of somewhat greater consequence: *Ligon v. City of New York*.[12] The *Ligon* case involved a constitutional challenge to the NYPD's controversial "stop and frisk" policy. Proponents of the policy said it substantially reduced crime and removed a large number of guns from the street; opponents said it unfairly targeted minorities and infringed their constitutional rights.

In January 2013, Judge Scheindlin granted the plaintiffs' motion for a preliminary injunction against the practice, finding that they had established a clear likelihood of success in proving the city's deliberate indifference to the unconstitutional practice.[13] (She later stayed this relief given the possibility of irreparable harm.[14])

Many hailed Judge Scheindlin's decision as a triumph for civil liberties. But the injunction also led to sharp personal criticism of the judge. A *New York Post* article claimed to have found a study prepared by the Bloomberg administration alleging that Judge Scheindlin was biased, ruling against law enforcement more often than any other judge in the district.[15]

The *New York Times* also ran an article highlighting that issues involving frisking were almost all directed to Scheindlin, suggesting that this was improper.[16] Judge Scheindlin was also criticized as biased because of statements she made to the press and in open court.

The issue became more complicated, however, when the Second Circuit stayed her order and criticized Judge Scheindlin in unusually harsh terms. And the court went further; it removed Judge Scheindlin from the case, a rarely imposed rebuke. The Court stated, "[u]pon review of the record in these cases, we conclude that the District Judge ran afoul of the Code of Conduct for United States Judges, Canon 2 (A judge should avoid impropriety and the appearance of impropriety in all activities.); *Ligon* v. *City of New York*, 538 F. App'x 101, 101–03 (2d Cir.), *superseded in part*, 736 F.3d 118 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014), and *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

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That presented a serious problem to the bar leaders. Should they defend Judge Scheindlin and thereby implicitly criticize the Second Circuit? Or should they remain mute, thereby forgoing what many regarded as their obligation to support the judiciary [but which branch of the judiciary?] at a time when it was under severe attack.

The bar associations as such did not act. However, after the initial ruling in the Second Circuit, several lawyers and law professors filed a curative motion challenging the order as having "breach[ed] . . . the norms of collegiality and mutual respect that should characterize interactions between District and Circuit judges."[17]

This had the desired effect. The Second Circuit backtracked. It explained the basis for its earlier order and clarified that it "did not intend to imply in our previous order that Judge Scheindlin engaged in misconduct cognizable either under the Code of Conduct or under the Judicial Conduct and Disability Act."[18]

After these episodes Judge Baer and Judge Scheindlin continued to serve as respected members of the bench.

An extreme manifestation of this problem occurred during the 2016 presidential election. Judge Gonzalo Curiel issued an opinion adverse to Trump University.

Donald Trump, then on the brink of obtaining the Republican presidential nomination, furiously denounced the decision and the judge's impartiality, because of the judge's Mexican-American ethnicity. Trump described Judge Curiel as "very biased and unfair" and "totally biased" on Twitter, before saying on CNN, "I've been treated very unfairly by this judge. Now, this judge is of Mexican heritage, I'm building a wall!" and "He's a member of a society where – you know – very pro-Mexico and that's fine, it's all fine, but I think – I think – he should recuse himself."

As President, Mr. Trump has criticized courts generally and specifically on several occasions, including during the legal battles regarding the travel ban and U.S. District Judge William Orrick III's grant of a preliminary injunction that blocked the implementation of the President's executive order withholding federal funds from "sanctuary cities." In particular, he has criticized the Ninth Circuit as having a "terrible record" before the Supreme Court. He has also called the decision to enjoin the travel ban "terrible" and having been made by a "so-called judge."[19]

The Trump attacks presented unique problems to bar associations because of their partisan political nature. The organized bar is – and must always be – non-partisan, as non-profit entities which purport to speak for the entire legal community. In mandatory bar states in particular, where lawyers must join and pay dues to the state bar association, partisan political activity is unacceptable. In this instance, therefore, bar leaders had to walk a narrow path: protecting the independence of the bar and rejecting Mr. Trump's remarks without straying into partisan territory. They did so.

Among the many parties who criticized then-candidate Trump's comments, several bar associations released statements. ABA President Paulette Brown, speaking for the organization, said:

> The strength of our democracy and the maintenance of the rule of law lie in the independence and impartiality of our judiciary. While publicly criticizing judicial decisions is every person's constitutional right, levying personal criticism at an individual judge and suggesting punitive action against that judge for lawfully made decisions crosses the line of propriety and risks undermining judicial independence. Anyone running for the highest office in the land should understand that the independence of the judiciary is essential for an effective and orderly government and justice system.[20]

The New York State Bar's statement expressed disapproval but did not mention Trump specifically, saying:

> The New York State Bar Association has consistently advocated for a highly qualified, independent and diverse judiciary. Judicial independence is essential to maintaining the rule of law and protecting individual rights.
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> While it is fair to criticize judicial rulings on the merits, it is not fair to attack a judge personally, because of disagreement with the judge's ruling. The recent attack on Federal District Court Judge Gonzalo Curiel's integrity and impartiality based on his ethnicity is improper.
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> No litigant can justify such criticism by asserting that the judge's adverse rulings may have been influenced by the litigant's own prior derogatory statements about that ethnic group. We must reject and speak out against an argument that would undermine our independent judicial system and the rule of law.[21]

The New York State Bar Association issued another statement after Mr. Trump, as President, made his critical remarks.

> The New York State Bar Association has long supported judicial independence as essential to maintaining the rule of law and protecting individual rights. An independent judiciary, able to make rulings based upon the law, rather than under pressure from the legislative or executive branch, is a vital part of our system of checks and balances.
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> This requires that our judges be treated with respect, regardless of whether parties to a litigation agree with the court's judgments and orders. It also requires compliance with orders of our courts, consistent with the rule of law.
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> Personal denigration of judges is improper and demeans the respect for the co-equal third branch of government that our Constitution requires.[22]

A number of other bar associations made similar statements, catalogued at https://www.americanbar.org/groups/bar_services/resources/resourcepages/immigrationstatements.html.

Bar associations are large and somewhat bureaucratic organizations. Moreover, their leadership turns over frequently. It is hard for them to act nimbly and consistently, especially in the modern era of the 24-hour news cycle and the lightning speed of the internet, but that is what this issue requires. Recognizing these limitations, major bar associations have developed guidelines and procedures enabling them to discharge this responsibility efficiently and effectively.

The American Bar Association's Standing Committee on Judicial Independence has created and distributed a pamphlet, available online, entitled, *Rapid Response to Unfair and Unjust Criticism of Judges*.[23] This document, designed to reflect the bar's "special responsibility to ensure that judges remain highly respected leaders of our legal system and communities," outlines recommended steps that bar associations can take in response to unfair personal attacks on judges and the judiciary that are "consistent with the American Bar Association's various model provisions governing the conduct of lawyers and judges."[24] The ideal response will be able "to provide the public with information to help them better understand the legal issues related to a specific situation, including the role of judges, the application of the law, and the

restrictions and responsibilities placed on judges in the canons and rules."[25]

The ABA's recommended process involves having a system in place before any attacks are launched, to enable rapid response. This involves the creation of a rapid response team that is "authorized to determine whether a response is appropriate and, if so, determine the extent of the response."[26]

The New York State Bar Association has noted this guide, as well as others, in an ethics opinion addressing the issue.[27] The Philadelphia Bar Association, the Nebraska State Bar Association, the Bench and Bar of Minnesota and the American Board of Trial Advocates have each issued similar guidelines.

This is not an issue that will go away, but we can take comfort in the organized bar's ongoing effort to defend judges and preserve the independence of the judiciary. Now more than ever, this is a crucial responsibility. ■

1. Interestingly, this rule has not always been in place. In a 1997 speech, Chief Judge Judith Kaye explained that "while judges are bound to silence when facing their critics about particular cases, that was not always so." Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 Hofstra L. Rev. 703, 714 (1997). She noted that Justice Marshall published two rebuttals to criticisms of *M'Culloch v. Maryland* and that Justice Holmes once gave an hour-long interview to a reporter about a recent opinion, essentially dictating the ultimate article. *Id.*

2. See New York State Bar Association Committee on Professional Ethics Opinion 1040 (12/9/14) (recognizing that "it is unethical for judges to answer criticism of their actions regarding pending or impending matters.").

3. 25 Hofstra L. Rev. 703, 715 (1997).

4. *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y.).

5. *Judge's Rejection of Evidence Is Criticized*, N.Y. Times (Jan. 26, 1996), https://nyti.ms/2zwKGBd.

6. *Clinton Pressing Judge to Relent: President Wants a Reversal of Drug Evidence Ruling*, N.Y. Times, Mar. 22, 1996.

7. *A Get-Tough Message at California's Death Row*, N.Y. Times (Mar. 24, 1996), https://nyti.ms/Bar2zxd9.

8. *See United States v. Bayless*, 921 F. Supp. 211, 217 (S.D.N.Y. 1996).

9. As described in Maria L. Marcus, *Is There a Threat to Judicial Independence in the United States Today?*, 26 Fordham Urb. L. J. 1, *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1724&context=ulj.

10. Daniel Wise, *26 Bar Groups Join to Defend Judiciary: Intemperate, Personal Attacks Criticized*, N.Y. L.J., Mar. 8, 1996, at 1.

11. https://www.americanbar.org/content/dam/aba/migrated/2011_build/government_affairs_office/indepenjud.pdf.authcheckdam.

12. 736 F.3d 118, 124–25 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

13. *Ligon v. City of New York*, 925 F. Supp. 2d 478.

14. *Ligon v. City of New York*, 2013 WL 227654.

15. Ginger Adams Otis & Greg B. Smith, *Judge vs. the NYPD*, N.Y. Daily News, May 15, 2013, at 8.

16. Joseph Goldstein, *A Court Rule Directs Cases Over Friskings to One Judge*, N.Y. Times, May 5, 2013, at A16. https://nyti.ms/2h2ryUC.

17. Request for Leave to File Motion to Address Order of Disqualification, *Floyd v. City of New York*, No. 13-3088 (2d Cir. Nov. 8, 2013), ECF No. 261.

18. *Ligon* v. *City of New York*, 736 F.3d 118, 125 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014).

19. President Trump's remarks illustrate another troubling aspect of such attacks. They are often made by government officials in cases in which the government itself is a party. As such, they constitute a disturbing effort by a litigant to coerce a court into reaching a favorable result. The same, of course, can be said of Mr. Trump's remarks in the Trump University case.

20. https://www.americanbar.org/publications/litigation_journal/2016-17/fall/when_attacks_judges_go_beyond_pale.html.

21. http://www.nysba.org/JudIndStatement/.

22. http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=70693.

23. https://www.americanbar.org/content/dam/aba/administrative/judicial_independence/rapid_response_pamphlet.pdf.

24. *Id.* at 1.

25. *Id.* at 2.

26. *Id.*

27. *See* New York State Bar Association Committee on Professional Ethics Opinion 1040 (12/9/14) (*available at* http://www.nysba.org/CustomTemplates/Content.aspx?id=53801).