tion. 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.\(^8\) 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.\(^9\)

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 assignment under the Act as cause for discipline or suspension . . . . Officers of the court may appropriately express criticism on such matters."\(^10\) 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.\(^11\)

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.

**Constant Watchfulness**

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."\(^12\) 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."\(^13\)

"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."\(^14\)

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

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 profession-
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al 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. 25

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, 26 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, Brearly, 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.] Doug- las (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. 27

Lincoln was a great lawyer who understood 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. 28 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. 29
When the judiciary undertakes a point-by-point defense of criticism leveled by members of the bar, it discourages what is 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. It has long been recognized that judges, “not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism.” When Justice Brennan wrote in the Sower case that “lawyers are free to criticize the state of the law,” 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. 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. Judges should encourage debate about controversial constitutional and legal issues.

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. Others have advocated judicial participation in policymaking where matters affecting the judicial process are concerned. Judge Irving R. Kaufman, my colleague on the Second Circuit Court of Appeals, holds that “judges may not merely express their views on matters within their judicial province, but have an obligation to do so in the public interest.” 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 ensure 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.” The justices of the Supreme Court and of other courts in the land must recognize, as did Justice Frankfurter, that lawyers “are under a special responsibility to exercise fearlessness” 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 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.

Notes
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. at EC 8-1.
12. Id. at EC 8-2.
13. ABA Model Rules Preamble, para. 5.
15. See generally STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1883); Rieger, Lawyers’ Criticism of Judges: Is Freedom of Speech a Figure of Speech? 2 CONST. COMMENTARY 69, 75-76 (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.)
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19. In re Snyder, 734 F.2d 334, 337.
20. In re Snyder, 472 U.S. 634, 646.
25. Moley, Criticism of the Court, NEWSWEEK Mar. 16, 1959, at 100.
31. ABA Model Code EC 8-6.
33. See ABA Judicial Code Canon 4 & commentary; see also Advisory Comm. on Judicial Activities, Advisory Op. 50 (1977).
35. See ABA Judicial Code Canon 4 & commentary.
39. In re Sawyer, 360 U.S. 622, 669 (Frankfurter, J., dissenting).