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1991

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Recommended Citation

Monroe Freedman, *Law in the 21st Century*, 60 Fordham L. Rev. 503 (1991)

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ESSAY

LAW IN THE 21st CENTURY

*MONROE FREEDMAN**

The tone and the essence of professionalism in the year 2050 will be set by Rambo judges. It will start at the Supreme Court level where, from the bench and in published opinions, justices of the Supreme Court will accuse each other of invincible ignorance, intellectual dishonesty and deliberate subversion of the Constitution.

The federal circuit judges, abusing rules like Rule 38 of the Federal Rules of Appellate Procedure¹ and 28 U.S.C. § 1927², will be using their judicial opinions and abusing their powers and their immunities by irresponsibly castigating practicing lawyers in their opinions, referring to their conduct as frivolous, as unprofessional, and even as deceitful. They will do this without notice, without hearings, on vague and inadequate standards, and with no right of appeal. And they will impose the harshest of sanctions, not infrequently in the hundreds of thousands of dollars.

Trial judges will probably be the worst. For them, moving the calendar will be the number one priority and will trump everything else, including due process, and other constitutional rights. They too will terrorize lawyers with threats of sanctions. They will boast to each other and vie among each other to impose the most severe sanctions and, ironically, calendars will be even more clogged because of the satellite litigation relating to these sanctions.

In civil cases, particularly, the ethics rules will be displaced by courtesy codes. There will be no discipline whatsoever for lack of zealous representation, but there will be sanctions for "discourtesy" such as the vigorous assertion of clients' rights. Due process for clients will be equated with delay, which will be equated with discourtesy, which will be equated with lack of professionalism.

Ultimately, there will be a realization that trials and evidence at trials are irrelevant because judges will omit facts in their opinions and will gratuitously add others with no respect for the record in the case whatsoever. Legal research, of course, will also become meaningless because the

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1. Fed. R. App. P. 38 provides that: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

2. 28 U.S.C. § 1921 provides that: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

judges routinely will miscite cases and misstate the holdings of cases that they discuss.

Particularly as a result of sanctions against lawyers, the law will become stultified. Prior to 1990, for example, the Supreme Court of the United States reversed itself more than 300 times. In years subsequent to 2000, however, there will be no reversals whatsoever. There will be no *Brown v. Board of Ed.*³ reversing *Plessey v. Ferguson*⁴ because the lawyers will have been on notice that litigation contrary to stare decisis is frivolous and that they themselves would be subject to heavy sanctions. There will be no *MacPherson v. Buick Motor Co.*⁵ overruling a century of well-established tort law of the freedom of manufacturers from liability to the ultimate consumer, because the lawyer who would have litigated *MacPherson* will be on notice that his litigation was frivolous in the face of the entire history of the common law in the State of New York and that he, too, would be subject to heavy sanctions. And so no lawyers will bring imaginative, creative cases before judges.

As a result of abusive judicial conduct, relations among lawyers will be characterized by anger, bitterness, frustration, and hostility. We will look back with regret at the good old days of what had been called "hardball litigation" and "Rambo lawyers." It was called that because of zealous representation of clients, not because of what we will have in the year 2050—constant attacks on each other with regard to sanctions.

In criminal cases, racism will affect the entire system, including arrest, pretrial detention, trial, conviction, and sentencing—including the death penalty. Defense lawyers will be seen as agents of the state, not zealous representatives of their clients. About eighty percent of the cases will be handled by public defenders, who will be operating as bureaucrats in an assembly line system of justice. They will perform only perfunctory interviews with their clients only minutes before the case is to go before the judge in crowded holding pens, where it will be almost impossible to hear each other speak. Those few minutes of time will be spent by the lawyers bullying their clients into pleading guilty, making it clear to their clients that if they choose a trial, they will remain in prison during pretrial detention and if convicted, they will be sentenced very heavily. If they will only plead guilty, however, moving the assembly line along, they will walk that very day. Occasionally, a public defender or legal aid lawyer will protest, but that rare lawyer will be accused by the judge of incompetence and will be fired for neglect of her clients.

A study by legal scholars at one of our major law schools will conclude that this system is not failing, but that it is working exactly as it was established in order to control the poor as cheaply and efficiently as possible.

3. 347 U.S. 483 (1954).

4. 163 U.S. 537 (1896).

5. 217 N.Y. 382, 111 N.E. 1050 (1916).

The other twenty percent of clients in the criminal justice system will fare no better. Prosecutors will win in the press, punishing the accused without due process through elaborate press conferences. Defense lawyers, on the other hand, will be effectively gagged by ethical rules and by courts.

Defense lawyers will be wholly-owned subsidiaries of the prosecutor's office. They will speak not to their clients, but will learn to speak to the body wires that their clients will be wearing at the behest of the prosecutor's office. They will be required to file forms reporting incriminating information about their clients. They will be called as witnesses against their own clients, and they will be imprisoned on grounds of contempt if they refuse to testify.

The fifth and sixth amendments will be viewed as quaint notions. It will be considered proper for prosecutors and other state officials to lie to defense lawyers. They may say to a defense lawyer, for example, that your client is sleeping and everybody else has gone home, when in fact the client is being interrogated at that very moment. Coerced confessions will be well regarded by prosecuting authorities. Prejudicial evidence will be introduced freely. Prejudicial appeals to the jury will be made regularly. This will be allowed because all of these things will be found to be harmless error.

Only prosecutors will be immune from this unpleasantness that we will face in the 21st century. They will be immune to civil liability because they are subject to professional discipline. They will face no professional discipline however, because the prosecutors' offices use internal discipline. They will not be subject to internal discipline, however, because the attitude in the prosecutors' offices will be that if there are no reversals on constitutional grounds, the prosecutor's conduct must, perforce, have been ethical. There will be no reversals on constitutional grounds, however, because the court will understand that prosecutors are subject to professional discipline. Thus, unethical prosecutorial conduct will be subject to no effective sanctions whatsoever.

Enforcement of ethics will not be directed against lawyers in prestigious firms, but rather against sole practitioners and lawyers representing poor people and particularly lawyers in civil rights and civil liberties cases. For example, if a lawyer is found to be giving a bottle of whiskey to a court bailiff at Christmas time, that lawyer will be vigorously disciplined. If a lawyer in a major firm, however, provides his client's corporate jet to a member of the Antitrust Division to fly to homecoming weekend in Michigan for the big football game, that will be ignored by disciplinary authorities.

Disciplinary processes will be marked by increasing judicial control, which means judicial interference with professional discipline on political and personal grounds.

In short, nothing is going to change in the next 59 years.

