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Michael Tigar

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THE ESSENTIAL MONROE FREEDMAN, IN FOUR WORKS*

*Michael Tigar***

Capturing Monroe's sixty years in the law, and the fifty years of our friendship, would be impossible. What does it truly mean to be a lawyer? Monroe addressed this question in so many contexts that no summary can do him justice. His is an integrated, considered body of work, based on human experience—his own and that of colleagues and clients. And, as you can see in everything he wrote, he also took vicarious account of injustices recorded in annals of the law and the lawless.

One cannot appreciate his contributions by reading a summary or bibliography, and I will not attempt to provide one. His work is not a series of episodes. Taken as a whole, it is a finely woven tapestry, in which we will continue to find new insight. Monroe would reject Oliver Wendell Holmes, Jr.'s image of "the law," but Holmes's metaphor of Bayeux suggests something important about Monroe's work:

When I think thus of the law, I see a princess mightier than she who once wrought at Bayeux, eternally weaving into her web dim figures of the ever lengthening past—figures too dim to be noticed by the idle, too symbolic to be interpreted except by her pupils, but to the discerning eye disclosing every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life.

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** Michael Tigar is a human rights lawyer. He is emeritus professor of law at Duke University School of Law and Washington College of Law. He is a past chair of the ABA Section of Litigation and is the author of books, articles, essays, and plays.

The tapestry image appeals to me because Monroe's work was not conceived all of a sudden and then worked out over time. His ardent, insistent, probing, sometimes fierce or sardonic—almost never solemn—methods of inquiry led him to embroider the main themes of his work with new examples and insights, and even at times to go back and change an emphasis or rendering.

I met Monroe in 1966, shortly after I came to Washington, D.C. Our mutual friend, Ralph Temple, was staff counsel of the ACLU in D.C.¹ There was a time when the three of us considered forming a law firm—Freedman, Temple, and Tigar. But we did not, though we kept in touch for all the intervening years. Ralph died in 1978.

We three moved away from Washington in different directions, but we continued the conversations we had begun every time we met.

Many people know about Monroe's and my debate about how and why we choose our clients, and what, if any, justification we should have for our choices. We came at this issue from different perspectives, sometimes in harsh disagreement. The fundamental issue for both of us was every lawyer ought to have some vision of his or her social responsibility. That is, the things we call "rules of professional responsibility" do not define the field of ethics properly so called. These rules, which Monroe at times decried as too limited, too timid, and sometimes solipsistic, define at most some small part of what lawyers are and should be. What we wrote and said was impassioned, though I think with mutual respect.

Just a hint, then, of what he thought and believed and gave to us. Let me visit four of his works: One of his paeans to Lord Brougham; his calling to account two lawyers who abandoned a death row client; a sharp attack on prosecutors who lie and cheat; and finally, his iconoclastic look at Atticus Finch.²

1. Known at the time as the National Capital Area Civil Liberties Union, it is now the American Civil Liberties Union of the National Capital Area.

2. See Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994); Monroe H. Freedman, *Henry Lord Brougham—Advocating at the Edge for Human Rights*, 36 HOFSTRA L. REV. 311 (2007) [hereinafter Freedman, *Henry Lord Brougham*]; Monroe H. Freedman, *Professional Discipline of Death Penalty Lawyers and Judges*, 41 HOFSTRA L. REV. 603 (2013); Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 WASHBURN L.J. 1 (2012) [hereinafter Freedman, *The Use of Unethical and Unconstitutional Practices*].

LORD BROUGHAM

In 2007, Monroe convened a conference at Hofstra to consider “lawyering at the edge.” He called his own contribution *Henry Lord Brougham—Advocating at the Edge for Human Rights*.³ Brougham’s life and litigation had long engaged Monroe’s attention. While representing Queen Caroline of England in the House of Lords—the “peer” sitting as a jury—Brougham had defined the advocate’s role in terms that adumbrated Monroe’s own ideas. Warned that his representation of the Queen might endanger the monarchy, Brougham said:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

Monroe loved that statement. He quoted it many times and defended his view of Brougham from critics who claimed that Brougham himself had later in life softened his vision of the advocate’s duty of zeal.

Monroe’s 2007 Hofstra essay takes our view beyond the “professional responsibility” of principled and zealous representation. It was never Monroe’s view that all lawyers must be “at the edge” in terms of seeking social justice. You might choose to be a prosecutor, or to represent wealthy people or corporations, provided you did so in harmony with the rules of professional responsibility. I do find in his work a suggestion that those rules ought to make pro bono work a duty, the breach of which can be enforced with professional discipline, rather than merely advising that lawyers do such work.

Monroe also counseled that lawyering at the edge was not lawyering “over the edge.” If properly interpreted, the rules of ethics—or professional responsibility if you will—not only allow but require the lawyer to court the risks of which Brougham spoke.

Brougham was a zealous campaigner, opposing not only the institution of slavery but the entire array of social injustices of England in the early 1800s. We can easily understand Monroe’s approval of Brougham’s views on the advocate’s role in litigation, but what is a professor of professional responsibility doing by lauding Brougham

3. Freedman, *Henry Lord Brougham*, *supra* note 2.

social justice advocacy in the context of a symposium on what lawyers ought to be doing?

Monroe's essay contains the key. He begins by quoting a racist 1858 speech by Abraham Lincoln, and contrasts it with Brougham's antislavery oration of 1838. He laments that Brougham is largely forgotten, while Lincoln is celebrated as an emancipator.

One is led to think of Vachel Lindsay's paeans to Governor John Peter Altgeld, Clarence Darrow's friend and mentor, who pardoned the Haymarket defendants. Lindsay's poem is called "The Eagle That Is Forgotten." And in the poem "Bryan, Bryan, Bryan, Bryan," Lindsay wrote:

Where is Altgeld, brave as the truth,
Whose name the few still say with tears?
Gone to join the ironies with Old John Brown,
Whose fame rings loud for a thousand years.

Monroe was always willing to debate a point. But when the principle was seen, analyzed, and defended, he would not temporize, nor heap praise on someone who did. He also knew, from study and personal experience, that lawyers see the human condition more closely than those in most other professions. Having seen injustice close at hand, one might not have the duty to address it, but certainly one could not claim to be doing that while in fact acting half-heartedly and with faint effort.

Monroe was too modest to make the comparison, but we can. Brougham pushed the idea of zealous advocacy to a limit that many powerful people found unacceptable. He confronted social injustice. He took his advocacy—including his defense of Queen Caroline—into the public media. This sounds a lot like our friend Monroe, and we will remember the example he set as much or more than what he wrote and said.

Put another way: To stand, as Monroe did for six decades, and confront social injustice against all manner of attack, requires a firm sense of who you are and what you are doing. That in turn requires that you live by the standards you have set for others and that you claim to have set for yourself. Monroe did not simply talk about a subject called "ethics." He was ethical.

MAPLES V. THOMAS, 132 S. CT. 912 (2012)

In 2013, Monroe discussed the professional responsibility issues in capital case representation. The *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* had by that

time—twenty years after first appearing—been revised and strengthened. Many courts had cited them with approval and some courts regarded them as setting out enforceable minimum standards.

Yet Monroe's discerning analysis of the ABA standards is not, for me, the most revealing part of the article. It is Monroe's dissection of lawyer performance in *Maples v. Thomas* that shows us Monroe's philosophy of client representation.

Here is an abbreviated summary of the facts: Cory Maples was an Alabama criminal defendant. His trial counsel was underpaid, ill-prepared, and ineffective. Mr. Maples was sentenced to death. Two associates in the New York firm of Sullivan & Cromwell entered the case and agreed to assist Mr. Maples in filing for state court post-conviction relief. This was a necessary step towards an eventual federal habeas corpus petition.

The two lawyers helped to draft a state trial court post-conviction petition but then did nothing to get a hearing on the petition. They then left Sullivan & Cromwell to pursue other opportunities. When the Alabama trial judge denied the petition, the order came to the Sullivan & Cromwell mailroom. Because the two lawyers were no longer at the firm, the mailroom clerk returned the envelope to the Alabama court clerk unopened.

This default meant that Mr. Maples's further state court proceedings were futile, and his eventual federal habeas corpus petition was denied because he had failed to avail himself of his state court remedy. The U.S. Supreme Court held that the two associates' abandonment of their client excused the procedural defaults.

Monroe's discussion of the Maples case leads us away from the intricacies of procedural default to ask what should happen to lawyers whose inattention to their duties imperils a client's life. Here is Monroe in top form. He arraigns the two associates, their law firm, their law partner, and their Alabama local counsel. He then circles back to focus on the associates. Neither of these young lawyers has showed any appreciation of their misconduct. None of the lawyers, nor the law firm itself, has been subjected to professional discipline.

Monroe contrasts this failure to enforce standards with proceedings taken against defense counsel who are claimed to have been too vigorous in seeking to prevent a client's execution. And he notes that judges who appoint counsel are often complicit, appointing lawyers who are not qualified, or failing to provide adequate resources for the defense.

Monroe's analysis characteristically takes in all the elements of the systemic failure of effective representation in capital cases. But the flame of his passion for justice burns most clearly when he illuminates two issues. The first of these is the lawyers' lack of commitment to a client they are sworn to defend. Death penalty work has a certain glamour and cachet for lawyers in big firms whose daily legal diet may be tedious.

These two young lawyers came into the case and quickly saw the most important issue. And then when it was time for the difficult, frustrating, and time-consuming business of getting a hearing date, and of making sure that the case was in good hands, they walked away. The litany of professional responsibility rules that these lawyers and those in their firm violated does not tell the entire story. Monroe tells that story—there is this broader and deeper idea of commitment to a client that goes beyond literal compliance with the rules. There is, as Monroe might say, the Brougham standard. This is “ethics” properly so called.

The second issue is the systemic failure of judges and the bar to take seriously this constitution-based idea of effective, zealous representation. Of what use are these rules if they are not enforced, or if enforced applied with an uneven hand? This is Monroe as eloquent social critic. The rules are simply devices with which one might fashion a system that could merit the name “justice.” As matters stand, they are simply lies the regime tells the people.

PROSECUTORS AND ETHICS

Monroe taught us that to see “the law” at work, one should concentrate on stories that showed the characteristics that he wished to praise or condemn. His essay, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, is an example of his way of seeing.⁴ I choose this essay because it encapsulates so many of the insights that Monroe gave us.

The essay reminds of the Mae West movie in which the prosecutor asks her, “What! Did you ever hear my integrity questioned?” And she says, “Honey, I’ve never even heard it mentioned!”

Monroe's method of attack is itself a lesson. He identifies two sources of prosecutor misbehavior: office policies that encourage rule violation and the problem of the rogue prosecutor. For defense counsel,

4. See generally Freedman, *The Use of Unethical and Unconstitutional Practices*, *supra* note 2.

the tactics for uncovering and combatting prosecutorial misconduct will vary depending on the real source of the wrongdoing.

Monroe also reminds us that, regrettably, the official response to both kinds of wrongdoing is the same: “[A] computerized review has shown that there have been only 100 reported cases of professional discipline of federal and state prosecutors in the previous century—an average of only one disciplinary case per year.”⁵ When government commits wrong, it has more power to inflict harm than any private person, and given its refusal to police itself, it is a recidivist.

But, Monroe tells us, fear not. The paucity of reported cases of professional discipline does not mean he will have a hard time finding examples of bad prosecutor behavior. Rather, there are so many of them that choosing some for his essay is difficult.

Reading this essay, I cast my mind back to the controversy that Monroe generated by his early work on defense counsel’s duties in criminal cases. Judges and leaders of the bar attacked him, and some of them sought to have him disbarred. These same paragons of ethical virtue turned out to be hypocrites. If they believed what they were preaching, we would find the law reports full of cases disciplining prosecutors. To paraphrase Samuel Butler, the officials who condemned Monroe and yet failed to discipline prosecutors are equally horrified at seeing ethics doubted and at seeing them practiced.

Imagine if all the interstate highways had billboards saying, “There is a posted speed limit, but we have decided not to enforce it. Your odds of getting a speeding ticket are about one in 100,000.” What would drivers do? Prosecutors operate in an environment where even those of noblest mind are tempted to ignore the rules. It is in this “real world,” not one imagined by Monroe’s detractors, that defense counsel must make decisions and the lives and liberty of real people are at stake.

Monroe’s use of examples is didactic in another way. Our understanding of prosecutors’ ethical violations is helpful to us only if we can recognize them when we see them, and can understand how to confront them. As the growing number of exonerations proves, the state has a habit of covering its misdeeds in secrecy and mendacity. We need the lawyer’s tools of vigorous inquiry to uncover them and to seek a remedy.

At all the levels of his discourse, therefore, this article teaches us. Monroe’s selections, and the way he tells these stories, put into play all his qualities of discernment and eloquence. He knows that in making his

5. *Id.* at 2.

point he is courting controversy—as was his wont for decades. He takes extraordinary—well, extraordinary perhaps for you and me, but for him typical—care to get the facts right and to draw only those conclusions that he can support.

ATTICUS FINCH

Lawyers are fond of holding up Atticus as an example of a principled person who happened to be a lawyer, and whose life and work were something to respect and emulate. Atticus himself, as depicted in the book, takes on the role of counselor and sage. And so, Monroe arraigned the Atticus Finch as most folks see him against the image of a principled well-to-do white lawyer in 1933 Alabama. Atticus does not come out so well. So far as the book tells us, he didn't do any pro bono work. He didn't volunteer for the Robinson case; he was appointed by the court. When he served in the legislature, he did not do anything about segregation. His pallid excuses for Klan members and lynch mob participants hardly reflect a stalwart and unyielding sense of justice.

To be sure, there are passages in Atticus's defense of Tom Robinson that are stirring, and that show a deep understanding of racial attitudes in 1930s Alabama. That is the Atticus we can all justly celebrate.

Academics hastened to criticize Monroe's revelatory essays about Atticus. One critic accused him of "presentism," another of "chronological snobbery." The Atticus of 1933 should not be judged by the Freedman of 2000, they said.

The excuse that a lawyer—or anybody else—was simply "a product of his (or her) time" is pallid and ahistorical. By definition, to borrow what John Berger said of artists, lawyers mediate between what is given and what is desired. It is an essential part of our everyday work to predict what will happen as a case moves along toward resolution. If we are mired in the past or present, we are not serving our clients. Within the professional lives of the youngest lawyers to read these words, the law has changed in sometimes dramatic ways.

A lawyer in 1933 Alabama had to know that a lawyer-driven civil rights movement had been underway for more than a half-century. If you doubt, read Susan Carle's book *Defining the Struggle: National Organizing for Racial Justice, 1880–1915*. The record of Klan violence and lynch mobs was there for anyone to read and know.

On the whole, Atticus flunks the essentially Talmudic test that Monroe poses for him, and for all the rest of us. No, Atticus was not

called upon to be Moses. A passage in *Deuteronomy* suggests that this would not be possible. He was, however, called upon to be Atticus Finch, to see what was going on around him and use his intellect and power to do something about it. Monroe's judgment of Atticus is not that everybody should work to end injustice. It was rather that if one claims to be doing that, or is claimed by others to be doing that, the observant commentator has the right to point out that self-image and reality are out of harmony with one another.⁶

CONCLUSION

There is a phrase in the Federal Sentencing Guidelines: "acceptance of responsibility." If you have that, then apparently you can get a lower sentence. I like the phrase independent of any such consideration. It expresses a central idea of Monroe's teaching about being a lawyer. Brougham told us that every lawyer must fully accept the responsibility for his or her role as an advocate.

The two lawyers for Mr. Maples "accepted responsibility" in a formal way by entering their appearance, and then failed to fulfill the duty they had agreed to perform.

Prosecutors, we are taught, have this dual responsibility:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer.⁷

Monroe spoke to us of prosecutors who think that fulfilling one of their duties excuses them from fulfilling the other one.

And finally, Atticus Finch. Who knows? Perhaps a real-life Atticus Finch would confess that he fell far short of doing what his own knowledge and experience had taught him he ought to do. Monroe's point was perhaps not so much about Atticus as about those who have

6. Harper Lee's newly published novel, *Go Set a Watchman*, would have made Monroe smile. See Randall Kennedy, *Harper Lee's 'Go Set a Watchman,'* N.Y. TIMES (July 14, 2015), <http://www.nytimes.com/2015/07/14/books/review/harper-lees-go-set-a-watchman.html>. Atticus, confronted by the civil rights movement, displays all the traits that Monroe attributed to him. The commitment to justice is not a theory, Monroe would say (again). You have to live it. This footnote was not in the original article in *The Professional Lawyer*.

7. *Berger v. United States*, 295 U.S. 78 (1935).

apotheosized him. That is, to the extent we do our jobs we can take pride in the doing. But we should not think that such scant attention to duty is worthy of unstinted praise. Yevgeny Yevtushenko, in the poem “Talk,” speaks of this:

How sharply our children will be ashamed
taking at last their vengeance for these horrors
remembering how in so strange a time
common integrity could look like courage.

We live in a time of violence and war. We are invited every day to salute fallen soldiers. Certainly we should mourn them. We may even regret they were sent to fight. But when we think of courage, we should be guided by Monroe’s advocacy and personal example. William James said of Robert Gould Shaw, whose monument was unveiled in Boston in 1887:

That lonely kind of courage (civic courage as we call it in times of peace) is the kind of valor to which the monuments of nations should most of all be reared, for the survival of the fittest has not bred it into the bone of human beings as it has bred military valor; and of five hundred of us who could storm a battery side by side with others, perhaps not one would be found ready to risk his worldly fortunes all alone in resisting an enthroned abuse.

Monroe’s fierce determination enlivens our memory of him.