

ARTICLE: Lawyer Certification, Civility, "Good Moral Character," and Pressures for Conformity

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Text

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In the past few years the Chief Justice of the United States has embarked on a mission to acquaint all of us with the fact that "civility" and "competence" are lacking in many of our American courtroom advocates and that the legal profession is generally lax in enforcing standards of legal ethics.

In a 1971 speech before the American Law Institute, called "The Necessity for Civility,"¹ Justice Burger called for a kind of definitive code of "personal behavior to insure civility in courts,"² because

... civility is to the courtroom and adversary process what antiseptic is to a hospital and operating room. The best medical brains cannot outwit soiled linen or dirty scalpels--and the best legal skills cannot either justify or offset bad manners.

With all deference, I submit that lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice. And without undue deference, I say in all frankness that when insolence and arrogance are confused with zealous advocacy, we are in the same trouble the courts of England suffered through more than a century ago. Today English Barristers are the most tightly regulated and disci-

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Marc Ray Clement Professor Emeritus of Law, 1954. This Article is a reproduction of the first article that Professor Cohen wrote in Volume 1, in the Spring of 1976, for The Journal of the Legal Profession. The blue book style conforms to the time this Article was written.

¹ Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971).

² *Id.* at 217.

plined in the world and nowhere is there more zealous advocacy.³

Two months later, he told the American Bar Association that the Bar must tighten its regulations concerning lawyer ethics.⁴

The ABA reacted to its "warning" by establishing a Special Committee [*102] on the "Moral Fitness and Character of Applicants for Admission to Law School," which had the task of re-examining "the feasibility and wisdom of establishing systems for screening applicants for admission to law school as to moral fitness and character for admission to the bar" ⁵ Nothing of substance has ever been heard from or about this committee.

On November 26, 1973, the Chief Justice, addressing the Fordham University Law School, noted that one-third of our trial lawyers in "serious cases" are "not really qualified to render adequate representation . . ." ⁶ because of incompetence, and many lack etiquette, manners and professional ethics. ⁷ He suggested that some system of "certification for trial advocates" be created based on the British model where "the quality of the English Barristers is uniformly high . . ." ⁸

To summarize this bit of recent history is not to berate or criticize the Chief Justice, mainly because little of this is new. Yet the Chief Justice is a catalyst of this train of thought, and it is time for common elements in these ideas to be brought together.

Although there can be no tolerance of disorderly conduct by lawyers or anyone else in courtrooms, and for that matter anywhere else, the lawyer has a right and a duty to express ideas he believes will help his client or generally aid the search for truth. However, among those who agree with Justice Burger, "civility" or even impertinent conduct by lawyers are never defined. No distinction is made between competence and behavior, with the resulting conclusion that one must be well behaved, good mannered and courteous in order to be a competent lawyer, especially a trial lawyer. If one must conform in all respects to the mores of one's community in order to be competent, i.e., if good manners, etc., are part and parcel of competence, there is an important point being made. If competent lawyers must be overly careful in expressing ideas and thought processes, a real question arises as to whether the welfare of our system is being enhanced. A great deal of valid change has been nurtured by imaginative nonconformists, and the legal profession has produced its share. Ideas can be expressed in courtrooms and elsewhere without tumult and shouting. The views put forth by the Chief Justice conjure specters of narrow control of trial lawyers by an established oligarchy enforcing vague, subjective standards. This vision is nurtured by past history and a fear that such certification methods will be applied to other areas of the practice of law. [*103]

Because of our historical experience any demands for more lawyer certification (we are "certified" already through bar examinations) and more civility must be open to question. It has been argued that the organized bar associations have often been guilty of xenophobia. ⁹ It may be coincidental, but during periods of national stress or periods of tension for the legal profession, either real or artificial, the organized bar has reacted vigorously to any challenge to the status quo. ¹⁰ It has been argued that the ethical standards promulgated in 1908 by the American Bar Association relating to solicitation and advertising, excluding all notice of specialization to the public, were directly aimed at "low status urban lawyers," often ethnic types who were not graduates of the "decent" and "respected" law schools, and who

³ Id. at 215.

⁴ Burger, *The State of the Federal Judiciary--1971*, 57 A.B.A.J. 855, 857-58 (1971). Four years later, the Chief Justice exhorted the state supreme court justices to drastically regulate the conduct of the Bar. *N.Y. Times*, Aug. 6, 1975, at 35.

⁵ Report of the Section of Legal Education and Admissions to the Bar, 97 A.B.A. Rep. 453 (1972).

⁶ Burger, *The Special Skills of Advocacy*, 46 N.Y.S.B.J. 89, 91 (1974).

⁷ Id. at 95.

⁸ Id. at 91.

⁹ Auerbach, *The Xenophobic Bar*, *The Nation*, June 19, 1972, at 784. "Today again--as early in the century during the Red Scare after World War I and in the McCarthy era--the legal profession equates character with conformity and, by so doing, practices politics under the guise of preserving professionalism." Id.

¹⁰ Id. "There is a venerable tradition of professional concern with character, but anyone familiar with the history of the American legal profession knows that this anxiety is episodic. It emerges during periods of national stress when professional elite groups are upset by the swift pace of social change, by sharp challenge to the status quo, or by what they perceive as rampant lawlessness and disorder." Id.

were causing the profession to be lowered in "public esteem."¹¹ In the 1920's, an effort was made, especially by the Pennsylvania Bar Association, to "strengthen the character" of aspiring lawyers, by not admitting applicants who had nonconformist attitudes generally, or toward the practice of law, or who said that they "might" do certain things under questioning by the bar examiners.¹² Many said the profession was "overcrowded," an old and still used [*104] euphemism for the idea that too many lawyers were going after a small percentage of the population's legal business (the commercial community), leaving the others to scramble after personal injury, criminal and divorce work. Only recently has it been realized that most of the population has much more legal work to be done.

In the cold war days, the American Bar Association resolved that all lawyers who are "members of the Communist Party of the United States" or "who advocate Marxism-Leninism" be expelled from membership and that "all state and local bar associations or appropriate authorities immediately commence disciplinary actions of disbarment" for such activity¹³ [italics added].

If courts consistently emphasize that lawyers' manners and thoughts are as important as their actions and thought processes are considered germane to "certification," the profession could be increasingly subjected to what has been called a "bureaucratization of spirit,"¹⁴ which pervades our society. Although the proponents of more certification and more civility may be shocked by the thought, their increasingly stringent demands are actually part of a large scale effort toward the invasions of privacy and harassment of those who disagree with governmental trends, either toward "equalitarian uniformity"¹⁵ or in the direction of other kinds of despotism. [*105]

What is Civility?

Civility can be generally defined as that mode of behavior which makes a restrained and moderate society possible.¹⁶ The idealists among us think of civility as those actions which demonstrate courtesy and dignity toward all, friends as well as opponents, those who agree and those who do not. A civil person is moderate and restrained toward all individuals, groups and ideas. Over time, however, those with political and social authority have used the concept of civility to sustain their power and position in society. The ruling elite has often used the term civility to describe toleration of each other's views and essential dignity. Those governed were supposed to obey the established order and remain civil toward it with similar conduct.¹⁷ Civility thus utilized as a political tool justifying acts of authority has been rationalized under duty concepts derived from natural law, with moral responsibilities emphasized. Once, however, it is demonstrated that the ruling regime acted in a less than divine manner, the concept of civility loses a moral foundation.¹⁸

¹¹ Auerbac, *supra* note 9, at 784. An expanded version of these arguments may now be found in J.S. Auerbach's *Unequal Justice* (1976). Although the work was published while this article was being published, and it is too late to discuss it here, the book is a documented history of Professor Auerbach's version of American bar associations and their impact on American law and lawyers. Although its substance may appear distasteful to many 1976 lawyers, we cannot escape the facts of our past, which demonstrate bar associations' and their leadership's hostility to changing social conditions, to say nothing of class, religious, racial and ethnic bias.

¹² Douglas, *The Pennsylvania System Governing Admission to the Bar*, 54 A.B.A. Rep. 701 (1929). The writer gave brief digests of the grounds of rejection in a great number of cases. Some of these follow, and it should be noted that these are direct quotes of reasons for rejecting an applicant to practice law.

¹³ Proceedings of the House of Delegates, 76 A.B.A. Rep. 531-32 (1951). Although it was argued by some that the term "Marxism-Leninism" was a vague term and Whitney North Seymour of New York moved to insert words like "and who has forwarded the objectives of" and to substitute for the term "Marxism-Leninism" the words "the overthrow of the government by force," such protestations were voted down. Mr. Canfield said that the term "Marxism-Leninism" is consistently used to describe the entire doctrine embraced by communism and is a more complete definition than that suggested by Mr. Seymour! *Id.* at 531.

¹⁴ Nisbet, *The New Despotism*, 59 *Commentary* 31, 42 (1975). "A century ago, the liberties which now exist routinely on stage and screen, on printed page and canvas, would have been unthinkable in America--and elsewhere in the West, for that matter, save in the most clandestine and limited of settings. But so would the limitations upon economic professional, educational, and local liberties, to which we have by now become accustomed, have seemed equally unthinkable a half century ago . . ." *Id.* at 43.

¹⁵ *Id.* at 42.

¹⁶ Mount, *The Recovery of Civility*, 41 *Encounter* 31 (1973).

¹⁷ *Id.* at 36-37.

¹⁸ *Id.* at 37.

Lately, civility is more utilized as a symbol of toleration either for the majority action or a minority viewpoint.¹⁹ In a democratic situation, there is a functional reason for civility. All viewpoints are assessed, and then preferences are voted. In this context the functional necessity for majority rule prevents chaos and disorder. However, if there is no moral or functional justification for civility, it becomes a neutral idea, which any individual or group, majority or minority, accepted or not, may discard when any cry of injustice or disagreement, real or apparent, appears.²⁰ [*106]

The extent to which any society will exercise civility is a matter of tradition and circumstances. Will a society truly tolerate conduct or attitudes which are repugnant to the majority's sense of order and justice? If repugnant people or ideas are tolerated, how must those persons or ideas be delivered and packaged? There is always a nagging fear that a society will not have "an inbuilt governor"²¹ and the majority will make undue demands on minorities, i.e., nonconformists, who cannot sincerely accept the restrictions ordered.

In a recent book by Professor John M. Cuddihy, *The Ordeal of Civility*,²² it is argued that the European-American Protestant dominated culture has increasingly turned the concept of civility into an esthetic judgment, an etiquette which makes artificial behavior, politeness, niceness, so-called good taste and restraint, the absolute values in society.²³ Those who do not conform do not enter society at most of its higher levels.²⁴ It is argued that western civilization helped create Marxism, Freudianism and even the Chicago Seven trial situation by demanding too much of what is labeled the "Protestant Etiquette,"²⁵ another label for a kind of civility.

Both Freud and Marx, it is said, went through much of the same type of conflict with the prevailing concept of civility of their times. Freud thought western civilization to be founded on the "suppression of instincts."²⁶ He argued that arbitrarily created and imposed manners, forms, social rites, and decorum are often used as masks for lust, greed or even violence.²⁷ The coarse and crude public world of economic and social relationships, as well as the private world of sexual intercourse, were "gentled"²⁸ by the society, producing only the appearance of ethics and morality.²⁹ Although Freud did not believe the system entirely nihilistic, he still resented what he thought to be a sickness.³⁰

The first political article Marx wrote was on censorship.³¹ He had [*107] been requested to restrain himself, but he could not suffer what he thought to be the "inherent tension"³² in the civilization between truth itself and the problem of speaking and writing the truth. For Marx, "tactlessness was no crime."³³ Restraint on writing or speaking

¹⁹ Id.

²⁰ Id. at 38.

²¹ Id. at 43.

²² J.M. Cuddihy, *The Ordeal of Civility* (1974).

²³ Id. at 13.

²⁴ Id. at 38. "The ticket of admission to European society was not civil rights but bourgeois rites. The price of admission as not baptism, as Heine thought, but Bildung and behavior." Id.

²⁵ Id. at 4.

²⁶ Id. at 40. Freud wrote in 1908: "Our civilization is, generally speaking, founded on the suppression of instincts. Each individual has contributed some renunciation--of his sense of dominating power, of the aggressive and vindictive tendencies of his personality." Id.

²⁷ Id. at 44, 54, 66.

²⁸ Id. at 66.

²⁹ Id. at 42. "There were ever to be constraints, a matter of conforming externally to the rules of others by concealment and dissimulation, a politics rather than an ethics or an etiquette." Id.

³⁰ Id. at 105. "You may suspend ethics and still have a tolerable world, but when you eliminate also the appearance of the ethical--namely, manners--nihilism is born. Freud was resentful enough to try this experiment, cautious enough to limit it." Id.

³¹ Id. at 121.

³² Id. at 123. "He perceives accurately that the civil society of bourgeois culture will yield on everything except procedures; it will concede all nouns, if it can retain control of the adverbs." Id.

³³ Id. at 128.

what one thought to be the truth was an "iron cage."³⁴ He finally came to the idea that the "primal savagery"³⁵ of the business struggle was masked by slogans and passwords, pretense or hypocrisy.

Although we should not take Professor Cuddihy's thesis too literally, his ideas are thought provoking to one interested in the American legal profession's attitudes toward civility and certification. In order to have a stable, orderly legal system, we must ask all lawyers to give up their unique personalities their conspicuousness, their authenticity?³⁶ Or is it better for the society that obsession of any degree be denied a place in the legal profession? It has been argued that the great cultural triumph of our middle class dominated society is the bringing into disrepute of obsession or fanaticism.³⁷ Yet, while most of us abhor fanatics, radicals and extremists, is it necessary to the general welfare that we deny admission to the professions of those persons and make professional pariahs of them?

Good Moral Character--Moral Turpitude and Nonconformist Attitudes

In the past century or so, the American legal profession and the courts have denied admission to or have disciplined lawyers who refused to take oaths or state their political, moral and social attitudes. Thus persons who do not conform to accepted patterns of delivering their opinions or views do not have "good moral character," which all lawyers must demonstrate before being admitted to the bar.

The conceptual umbrella for the testing of "character" has been the judge-made ideas³⁸ now codified in Disciplinary Rule 1-102 of the ABA Code of Professional Responsibility. It is said that lawyers shall not "engage in illegal conduct involving moral turpitude . . ." ³⁹ or "engage [*108] in any other conduct that adversely reflects on his fitness to practice law."⁴⁰ The term "moral turpitude" is extensively used in many statutes as well as in disciplining professionals generally.⁴¹ There are cases involving the definition of moral turpitude concerning deportation of aliens, impeachment of witnesses, defamation proceedings and numerous other situations.⁴²

Courts have held lawyers to lack moral turpitude where there was habitual intoxication,⁴³ bigamy,⁴⁴ operation of a house of prostitution,⁴⁵ conduct amounting to adultery or fornication,⁴⁶ operation of a gambling room⁴⁷ and for continuously making "anonymous, embarrassing, disturbing and annoying telephone calls" to the office of a physician.⁴⁸ Decisions have not always been consistent, and in situations such as automobile traffic misconduct, income tax violations, assault and battery, and manslaughter there is little uniformity.⁴⁹

The term "moral turpitude" was condemned by Professor Bradway in 1935 as a concept which is "vague, nebulous .

³⁴ Id. at 125.

³⁵ Id. at 141.

³⁶ See Broyard, Books of the Times, N.Y. Times, January 2, 1975, at 31.

³⁷ J.M. Cuddihy, supra note 22, at 125. "A man Marx obsessed, he attacks bourgeois civil society whose 'great cultural triumph is,' as Podhoretz observes, 'precisely that it brought obsession into disrepute.'" Id.

³⁸ In re An Investigation of the Conduct of the Examination for Admission to Practice Law, 1 Cal. 2d 61, 68, 33 P.2d 829, 832 (1934); see Comment, 15 Stan. L. Rev. 500 (1963).

³⁹ ABA, Code of Professional Responsibility, DR 1102(A)(3).

⁴⁰ Id. at DR 1-102(A)(6).

⁴¹ Weckstein, Maintaining the Integrity and Competence of the Legal Profession, 48 Tex. L. Rev. 267, 276-77 (1970).

⁴² Bradway, Moral Turpitude as the Criterion of Offenses that Justify Disbarment, 24 Cal. L. Rev. 9, 15 (1935).

⁴³ See Annot. A.L.R.3d 692, 694-95 (1968).

⁴⁴ See Annot., 36 A.L.R.3d 735, 739 (1970).

⁴⁵ Id. at 740-41.

⁴⁶ Grievance Committee of Hartford County Bar v. Broder, 112 Conn., 263, 152 A. 292 (1930) (disbarment ordered).

⁴⁷ Matter of Fischer, 231 App. Div. 193, 247 N.Y.S. 168 (1930).

⁴⁸ State v. Ablah, 348 P.2d 172 (Okla. 1959).

⁴⁹ See Weckstein, supra note 42, at 19.

... with "a discretionary meaning,"⁵⁰ and his point was amply demonstrated in a Kansas case, *State v. Bieber*,⁵¹ where a lawyer was disbarred for possession of liquor during the great experiment, but whom one judge said was really disciplined because he advised his clients to evade the law.⁵² The quest for meaning on the subject was characterized by Justice Robert Jackson as one involving a "wearisome repetition of cliches" and "irrationality,"⁵³ often bearing no apparent relationship to fitness for the practice of law. [*109] Despite such pronouncements there are cases where lawyers have been held to lack moral character and fitness to practice law for expressing unpopular ideas.⁵⁴ In *In re Summers*,⁵⁵ a conscientious objector, who refused to take an oath to bear arms for the state of Illinois, was denied admission to the bar. Admission has been also denied in a case where the applicant refused to take a non-communist oath and had written critically of the country's policies.⁵⁶ The reason given for not admitting such an otherwise qualified person was based on a lack of cooperation with bar officials. The most recent United States Supreme Court decision on the subject upholds oaths which demand acceptance of state and United States constitutions "without any mental reservation,"⁵⁷ and those who do not sign such oaths are refused admission to practice law. In these decisions, as usual, the concept of moral character is utilized,⁵⁸ and, in spite of the dissatisfaction with the vagueness and subjectivity of the standard, it seems that a great deal of outspoken resentment⁵⁹ has once again been beaten back.

Although it would be untrue to say that American lawyers have been coerced into conformity and silence on controversial issues, it can be argued that the judiciary has often found lawyers "unfit to practice law," because of a lack of civility, good manners, or for merely thinking unpopular attitudes aloud. The situation is not of recent origin. The original lawyers for Peter Zenger were "struck out of the roles of attorneys" without a hearing because they signed and offered into the records an "exception denying the legality of the judges and their commissions."⁶⁰ Courts generally do not accept much so-called "impertinence" [*110] even when conduct is constructive⁶¹ and have disciplined lawyers either by contempt citations⁶² or suspension from practice when they express disagreement on an assortment of ideas.⁶³ Granted that excesses of zeal, emotion and accuracy of the lawyer are difficult to tolerate, nevertheless appellate decisions do not give lawyers much leeway.⁶⁴

The prevailing judicial attitude seems to discipline or punish bar applicants and lawyers for their attitudes as much as for their overt actions or activities. The recent handling of the Alger Hiss case in Massachusetts is a good example. On April 4, 1975, Alger Hiss was denied reinstatement to the Massachusetts Bar by the Board of Bar Over-

⁵⁰ Bradway, *supra* note 42, at 19.

⁵¹ 121 Kan. 536, 247 P. 875 (1926).

⁵² In a concurring opinion, Justice Harvey said that he conceded that the mere possession of intoxicating liquor does not necessarily involve moral turpitude, but

⁵³ See Weckstein, *supra* note 41, at 278.

⁵⁴ See the cases collected in Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 Col. L. Rev. 109, 1051 (1952).

⁵⁵ 325 U.S. 561 (1945).

⁵⁶ In re Anastaplo, 366 U.S. 82 (1961) (Bar Committee engaged in a "wide-ranging exchange" to explore such things as Anastaplo's "abstract belief in the 'right of evolution'"). See also Konigsberg v. State Bar of California, 366 U.S. 36 (1961) (In this case, a companion to *Anastaplo*, Konigsberg unequivocally denied any belief in violent overthrow of government but he refused to sign any oath.).

⁵⁷ Law Students Civil Rights Research Council, Inc. v. Wadmond 401 U.S. 154 (1971). See Annot., 33 L. Ed. 2d 865.

⁵⁸ In the *Wadmond* case, the Supreme Court emphasized the *Anastaplo* and *Konigsberg* cases, and it seems they are still good law. 401 U.S. 154 (1971).

⁵⁹ In the first of the famous *Konigsberg* decisions, wherein an applicant for admission to the bar refused to sign any oath, Justice Black said that the term "good moral character"

⁶⁰ N.Y. Times, April 7, 1975, at 33.

⁶¹ See Lawson, *Public Criticism of the Courts by Lawyers: A Problem in Legal Ethics*, 15 Ala. L. Rev. 461, 472-74 (1963). See also B. Twiss, *Lawyers and the Constitution* 1962) for a discussion of "respected" lawyers for large monetary interests guiding the thought processes of judges.

⁶² See Annot., 27 L. Ed. 2d 953, 963 (1970).

⁶³ See Annot., 14 L. Ed. 2d 934, 954 (1965).

⁶⁴ See Lawson, *supra* note 60, at 471. See also 12 A.L.R.3d 1408 (1967).

seers because there had been no pardon or reversal of his conviction.⁶⁵ In its statement concerning the seventy-year old Hiss, disbarred in 1952, the Board said that it would "unanimously find that Mr. Hiss is presently of good moral character and would almost certainly not commit any serious crimes if readmitted to the bar."⁶⁶ To the Board, prior acts demonstrating moral turpitude spoke louder than a lawyer's ideas, words or reputation for over twenty years. However, the Supreme Judicial Court of Massachusetts reversed the Board and continued a tradition which seems to hold that it is the mental processes of a lawyer which are important, not his prior illegal acts. The court made it quite clear that the lawyer need not admit prior guilt or accept past action of the state. Yet, "Rehabilitation . . . is a 'state of mind,'" ⁶⁷ they said. The lawyer shows a genuine demonstration of good moral character who harbors no rancor, animosity or grudge against those who prosecuted him, who does not bewail the financial loss caused by his conviction and disbarment, and who earns a reputation for honesty and integrity while working as a salesman. Although Hiss personally admitted no change in his character through all of his ordeal, the court felt that his intent and attitude toward the judicial system and our society ⁶⁸ are more important than any action that system took more than twenty years ago.

The point that actions do not speak louder than attitude is again exemplified when comparing the treatment suspended or disbarred lawyers receive on application for reinstatement with the cases involving lawyers guilty of highly illegal or reprehensible activities but who plead [*111] mental illness during such period of activity. A suspended or disbarred lawyer must demonstrate not only "rehabilitation" but evidence of unimpeachable character, clear evidence of a good reputation for professional ability, evidence of lack of malice and ill feeling toward those involved in bringing the disciplinary proceedings and persona assurances of a sense of repentance.⁶⁹ But under modern case law if a lawyer proves that he suffered from mental incompetence while indulging in illegal or unethical activities, his actions are considered irrelevant. There is no need here to show any evidence of unimpeachable character or lack of malice.⁷⁰

The Supreme Court of Washington has demonstrated this principle as well as it can be shown. In *In re Sherman*,⁷¹ Sherman made false statements on his application to practice law in Oregon, sent an insulting letter to a trial judge in Oregon, used force and threatening language on numerous occasions, and discharged a court-appointed attorney who was representing him on his request because he thought the lawyer to be representing "undesigned 'conflicting' interests."⁷² Sherman was said to be suffering from "'paranoia,' 'paranoid trend,' and 'paranoid personality.'" ⁷³ The court decided not to discipline him in any manner, nor demand treatment although the psychiatrists were not in agreement as to whether his condition could be cured without extensive treatment. It was felt that his conduct was the result of mental incompetency or disorder. The Chief Justice, in dissent, noted that Sherman never realized "the seriousness of his offenses, that he truly regrets his action in falsifying his application or that he feels now it was unjustified."⁷⁴ In the following year, however, the same court ⁷⁵ disbarred a lawyer who showed an addiction to the use of alcohol, which brought on a manic-depressive [*112] psychosis, but who was taking treatment and was progressively improving. The lawyer's plea to be suspended until he was cured was denied.

⁶⁵ N.Y. Times, May 10, 1975, at 1, 12.

⁶⁶ *In re Alger Hiss*, 333 N.E.2d 429, 438-39 (1975).

⁶⁷ *Id.* at 434.

⁶⁸ Testimony was quoted stating: "His attitude is that his is our system of justice and he will take his chances with it again and again and again." *Id.* at 441.

⁶⁹ See *In re Florida Bar*, 301 So. 2d 448 (Fla. 1974).

⁷⁰ *In re Bourgeois*, 25 Ill. 2d 47, 182 N.E.2d 651 (1972). In *Theard v. United States*, 354 U.S. 278 (1957), the Court felt that Theard should not be disbarred from practice in the federal courts eighteen years after he committed a forgery when he was "suffering under an exceedingly abnormal mental condition, some degree of insanity." *Id.* at 282. See Annot., 96 A.L.R.2d 739 (1965).

⁷¹ *In re Sherman*, 404 P.2d 978 (Wash. 1965).

⁷² *Id.* at 983 (dissenting opinion of Justice Rosellini).

⁷³ *Id.* at 979.

⁷⁴ *Id.* at 983. "But 'secretiveness' is a characteristic of paranoia, and we do not know what falsifications may have occurred and been concealed. It can be seen, from the record before us, in my opinion, that the respondent has not rid himself of all of his feelings of persecution or his tendency to duplicity." *Id.*

The Questionable Need For Conformity Conscious, Over Certified Lawyers

American lawyers have often been told that they should look to the English barristers for examples of trial specialists and lawyer specialists generally who are uniformly competent, have good manners and comply with rules of ethics. Recent research has demonstrated that the barristers are not all they seem to be, especially as they are blandly reported to be in articles and speeches for American consumption.⁷⁶ The practical formal trial advocacy training the ordinary English bar student receives is questionable, and it is only when he enters "pupillage" that he might receive good training in "Chambers" under a barrister who may or may not be a good teacher.⁷⁷ This assumes in the first place that the student is "acceptable." In fact, there is a great deal of discrimination of all kinds in the process.⁷⁸ The English Bar makes available a limited number of openings for bar students in a limited number of Chambers, mostly in London. One cannot become a barrister unless a place is found in Chambers, and such places are not granted on the basis of merit alone, to say the least.⁷⁹ In addition, the bar student's expenses are much higher than other students in the various professions in England.⁸⁰ Within the bar, status and conduct is controlled by a small group at the top, especially the Lord Chancellor, and selection to the rank of Queen's Counsel ("silk"), and thus to the Judiciary are often based on subjective rather than objective standards.⁸¹ It comes as no surprise, therefore, that the [*113] English Bar is homogeneous and conformist, with a "lack of inclination to criticize either fellow lawyers or legal institutions."⁸² In addition, the English barristers do not follow many of their own highly praised ethical precepts. For example, we are told that an important ethical rule demands that the barristers are open to all who want their service and a barrister cannot refuse a brief for reasons of convenience or personal attitude or situation.⁸³ Yet a solicitor of more than twenty-five years experience has written in 1975 that the English barrister is quite regularly "unavailable" and it is "a fact of professional life" that the barrister's clerk is the decision maker concerning what cases his principal shall accept.⁸⁴ The British model set for the American legal profession is replete with contrived and exaggerated myths, even though many English trial and appellate barristers are extremely fine lawyers. They are, on the

⁷⁵ *In re Moody*, 420 P.2d 374 (Wash. 1966). Again, the Chief Justice in dissent said that this case is not unlike *Sherman*, and, if the court is going to recognize a defense of "mental or emotional illness" the defense should be available to all on an equal basis. As the law now stands, the availability of the defense depends upon the nature of the lawyer's offense. If his violations of the code of ethics are falsifications of his application for admission and contemptuous remarks addressed to a court of a sister state, the defense is available; on the other hand if his offenses consist of neglect of duty to clients and misappropriation of funds, the defense is not available. The question of whether the attorney has recognized his disability and is seeking a cure is irrelevant. . . .
." Id. at 378.

⁷⁶ See, e.g., Lund, *The Legal Profession in England and Wales*, 35 *Jour. Am. Jud. Soc.* 134 (1952). Usually these articles are descriptive of existing appearances. See also Cohen, *Ambivalence Affecting Modern American Law Practice*, 18 *Ala. L. Rev.* 31, 32-33 (1965).

⁷⁷ M. Zander, *Lawyers and the Public Interest* 28 (1968) ("But whether one lights upon a master who has both the talent and the inclination for teaching is entirely a matter of luck. Moreover, even a Socrates needs leisure to put over his message and time is one commodity in acutely short supply amongst practicing lawyers. The abler they are, the more work they have and the less time there is to pour over a problem with the apprentice to discuss possible ways of handling it").

⁷⁸ Id. at 30-31.

⁷⁹ Id. at 52, 71-73, 84, 261. "It is sometimes said that the Bar is already open to all classes and the isolated example is given of someone with working-class or other modest background who makes a successful career at the Bar. But these are exceptional cases. For the most, the Bar is drawn from the middle and especially the upper middle classes." Id. at 261.

⁸⁰ Id. at 49-52. "Although at present the Bar is in a flourishing condition compared with the 1950's the profession is still chancy and it is still the case that men fail to make the grade through no fault of their own or lack of ability." Id. at 52.

⁸¹ Id. at 130-32. "The accolade of silk is a license to earn more money than could be earned without it. It is bestowed on the basis of principle. No reason for refusal of silk is ever given and it is not surprising that some of those who are refused should, rightly or wrongly, believe that the reason was questionable--possibly a matter of religion, political views, nonconformity on social or professional attitudes, background, accent or other equally discriminatory grounds. More likely it is simply that the person refused wasn't "in the swim" of those who play a role in life at the Bar, in the Inn, on Circuit, or in Chambers. The system is by its nature open to doubts of this kind. No one knows on what principles applicants are accepted or rejected and justice is therefore not seen to be done." Id. at 132.

⁸² M. Freedman, *Lawyers' Ethics in an Adversary System* 106 (1975).

⁸³ C.D. Wickenden, *The Modern Family Solicitor* 15 (1975) ("While in theory one could treat the Bar as a cab rank, and secure the barrister of one's choice, barristers' clerks were adept at saying that Mr. So-and-So was unfortunately not available.").

⁸⁴ Id. (The author stated that when he told this to a judge of the Court of Appeal he exclaimed that it was illegal. He said that the solicitors should let him know about it. Yet Mr. Wickenden says it is a fact of professional life a little can be done about it!).

whole, however, no better or worse than a similar type group of American lawyers. In fact barristers may be uniformly less competent in representing their clients than their American counterparts. They indulge in what could be called a great deal of "nonethics." Their so-called expeditiousness in the trial of cases probably is a result of what has been called being "easy-going with each other."⁸⁵ This may mean that the counsel who is concerned mostly with manners and offending his opponent and the judge is not paying enough attention to his client's interests.⁸⁶ By taking the concept of "officer of the court" to an extreme, it is [*114] quite probable that the society and the judicial system suffer.

As just demonstrated, it may not only be dangerous but also an indulgence in myth-making, to take the notion that lawyers are literally servile officers of the courts to its logical conclusion. Indeed, the Supreme Court of the United States has almost said as much.⁸⁷ Justice Powell, a former President of the American Bar Association, quoting Justice Black, said that a lawyer was not an officer of the court within the ordinary meaning of the term.

Unlike these officials [marshals, bailiffs, court clerks or judges] a lawyer is engaged in a private profession, important though it be to our system of justice. In general, he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business.⁸⁸

Justice Powell continued,

Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interest, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of their being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.⁸⁹

One wonders why we should fear even the extremely radical lawyers, who are very few in number. They attain very little political power or even access to the centers of power. As Justice Powell said, no lawyers are officials of government merely because they are admitted to the Bar. Nonconformist types of lawyers gain, in the main, radical clients or those who cannot employ other lawyers or whom other lawyers do not want to represent. The radical nonconformist, the revolutionary, has always been shunned by society. They pay a dear price for their luxury, for nonconformity is a quality most of us can ill afford. Besides, the nonconformist of whatever stripe is usually incapable of practicing true civility. They trust no viewpoint other than their own and they do not separate persons from the ideas and attitudes they hold.

It as been said that one of the downfalls of President Nixon was the [*115] fact that he "never understood that the political friend and the political rival are often the same man."⁹⁰ His personal insecurity was too great to allow him the genuine virtue of civility. The same can be said of a system which does not practice this kind of tolerance.

⁸⁵ M. Freedman, *supra* note 82, at 108. Dean Freedman backs up these facts with the same experiences I had in England. Barristers are selected, promoted and "accepted" within the Bar by being "in" the club. Barristers are far more tolerant of each other's errors and performances than their counterparts in the United States. If a Barrister is not accepted by his brothers at the Bar he will find the going very rough. See Cohen, *The BLA 1964-1974: Some American Comparisons and Observations*, 118 Sol. J. 322, 323 (1974).

⁸⁶ *Id.* at 108. "When counsel is principally concerned with not offending the judge and the opposing attorney, the client's interest suffers. That result is rendered more acceptable to the barrister than to the litigating attorney in the United States, because the former is relatively remote from the client. Indeed, barristers consider their aloofness from their clients and from their clients' causes to be a mark of esteem . . ." In the October 26, 1975, issue of the *Manchester Guardian Weekly* it was reported that "leading counsel" had not insisted on a detailed study of medical and scientific evidence in a criminal case where two young boys of 18 and 15 with respective IQ's of 8 and 76 were charged with murder. The boys had alibis if the evidence had been presented. The newspaper editorial pointed out that it was laymen who did the work after the boys' convictions had been upheld by the Court of Appeal, which finally overturned its own earlier opinion and the verdict. 113 *Manchester Guardian Weekly*, Oct. 26, 1976, at 6.

⁸⁷ *In re Griffiths*, 413 U.S. 717 (1973).

⁸⁸ *Id.* at 728-29.

⁸⁹ *Id.* at 729. See Countryman, *Loyalty Tests For Lawyers*, in V. Countryman & T. Finman, *The Lawyer in Modern Society* 835 (1966), which argued for this position at an early date.

⁹⁰ Fairlie *The Lessons of Watergate*, 63 *Encounter* 8, 12 (Oct. 1974). "Nixon has, throughout his career, been able to allow neither political friends nor political rivals to be close to him; in fact, he has never understood that the political friend and the political rival are often the same man. Amicitia is formed, as often as not, with a rival; that is why the relationship is responsible, the

In April of 1975, two examples of vociferous, provocative lawyer attitudes toward courts in New York went unpunished but not unrecognized. Lawyer and judge reaction were most interesting and enlightening, somewhat summarizing our thesis in this discussion.

After the so-called "Attica jury" came in with their verdict on April 6, 1975, William Kuntsler reacted to Judge Gilbert H. King's order remanding his client, who had been out on bail during his trial, until sentencing two weeks thereafter:

"Why are you remanding them?" asked William M. Kuntsler

. . . "John Mitchell was not remanded."

"They are remanded," said the judge angrily . . .

"There is no justice in this court," Mr. Kuntsler declared.

Ramsey Clark, who had embraced his client, Mr. Pernasilice, asked the judge what his reasons were for revoking bail.

"I don't want to hear any argument on this subject anymore. They are remanded," the judge repeated.

Mr. Kuntsler shouted, "If they die in jail, you know who put them there."

"You did," the judge shouted back, and he added that if the lawyer wished to pursue the argument he could follow his client to the Erie County Detention Center.⁹¹

On April 17, 1975, the Association of the Bar of the City of New York protested Chief Judge Breitel's action in transferring Judge Bruce McM. Wright from the New York Criminal Court to the civil side, Judge Wright had been involved in much controversy because of his extremely liberal policy toward bail, setting either no bail or low bail in most cases. The Association accused the Chief Judge and his aides of yielding [*116] "to pressure from groups dissatisfied with particular judicial decisions, when it [the court] should have made a deliberate effort to lend positive support to a beleaguered colleague."⁹² There was little doubt that Judge Breitel was accused of yielding to pressure from groups such as the Patrolmen's Benevolent Association, with a very strong insinuation that the Chief Judge and his aides were biased. Judge Breitel and Richard J. Bartlett, the statewide administrative judge, issued a statement in response to the charges by saying that, ". . . the report was a 'fair and objective description of the facts,' but that the 'interpretation of the facts and the conclusions reached are matters of disagreement among reasonable men.'" The New York Times report continued, saying,

Traditionally, the relationship between the Association of the Bar of the City of New York and the judicial leadership has been close and cordial. Last month Judge Breitel, a member of the Association since 1938, and Justice Bartlett addressed the bar group on the difficulties of court administration. Prepared by the Association's committee on criminal court law and procedure, the report was approved by the Association's executive committee.⁹³

Although in both instances outlined above, the lawyers involved could have been judged in contempt and subjected to discipline, sophistication and good taste was exhibited only by the Chief Judge. Although ultimately it seems that both judges recognized the need our system has for those who speak out and who refuse to remain mute in the face of what they consider wrong, the judges chose to differentiate between types of lawyers. In some ways, it could be argued that the Association of the Bar's conduct was more contemptuous than Kuntsler's, yet they were

agreement is sacred. It is relevant and significant that, throughout his career, he has consistently revealed a personal insecurity which explains these inabilities . . ." *Id.* at 12.

⁹¹ N.Y. Times, April 7, 1975, at 8. One of the recent works on American legal ethics and the adversary system argues that our judges have not disciplined lawyers for incompetence but rather for expressions of zeal. M. Freedman, *supra* note 82, at 101. If incompetence does exist in our courtrooms, our judges should act quickly. However, as most of us know, it is often difficult to demonstrate what is true incompetence in court and what is tactical. Much of the nonconformist legal styles are not necessarily disruptive nor demonstrations of incompetence. Disrespect for judges and the system is open to a wide degree of interpretation and often has little to do with competence or true civility.

⁹² N.Y. Times, April 18, 1975, at 1, 54.

⁹³ *Id.*

treated with utmost cordiality. For the good of our system, all lawyers should be treated alike and the judiciary should grant great leeway to lawyers' impertinence and criticism. Any other course leads to servile conformity which not only stymies constructive criticism but can result in discriminating between critics and conformists as to who can be certified to practice law or specialize.

Professor Eric Goldman discussing Dalton Trumbo's book *Additional Dialogue*, *Letters of Dalton Trumbo, 1942-1962*, placed our problem in its best perspective when he said,

. . . In one letter Trumbo speaks of a 'brand of cussedness' which has served America well by insisting that broad areas of a [*117] man's life--his marriage, his religion, his politics or the cut of his clothes--are nobody's business but his own. He has not only expressed this attitude with spitfire eloquence; he has lived it with high courage and no small personal sacrifice. *Additional Dialogue* is a salutary volume to have published in 1970 when many of one generation seem to have forgotten, and many of a newer generation appear never to have learned, what pressures for conformity--from the right, middle, or left--can do to the blessedly cussed.⁹⁴

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⁹⁴ Goldman, Book Review, *The N.Y. Times Book Review*, Nov. 1, 1970, at 6.

