INHERENT JUDICIAL POWER AND DISCIPLINARY DUE PROCESS

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The question here concerns the judicial power to create, augment or diminish the procedural due process entitlements and expectations of lawyers charged with substantial violations of rules governing professional conduct. To what extent must the full sweep of the constitutional promises of due process be honored in disciplinary proceedings? What is the source of the judicial power to limit the extent of procedural process due the accused lawyer? Can limitations be imposed simply to improve the efficiency of the disciplinary processes and to impress the public that more and more malefactors are being ejected from the legal ranks?

These are neither idle nor easy questions. This is particularly so in an era when the bar is under intense pressure, both internally and externally, to improve the moral and ethical standards of the legal profession and to upgrade the low public esteem of lawyers.[1] We have witnessed in the past few years a dramatic rise in vigilant enforcement of standards of conduct. Increasing numbers of lawyers are being subjected to disciplinary proceedings which, not infrequently, result in disbarment or suspension from practice.[2] But query: Is this vigilance in pursuing

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1 The most influential of the many complaints about the bar's seeming inability to clean up the profession by use of disciplinary proceedings was the 1970 report by an American Bar Association special committee, headed by retired Supreme Court Justice Tom C. Clark. ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). That report found that the situation respecting enforcement of lawyer discipline was "scandalous" and that a "substantial number of malefactors" continued to practice law. *Id.* at 1-3. The report found that a significant problem in lawyer discipline was the reluctance of lawyers and judges to report misconduct. *Id.* at 167. Much the same problem exists today.

2 The American Bar Association has attempted to compile the actual number of reported disciplinary cases from each of the 51 bar jurisdictions. *See* STANDARDS FOR IMPOSING LAWYER SANCTIONS app. 3 (1986). The states vary in the operation of their discipline systems and in the extent to which disciplinary orders are published. The ABA study generally covers the years 1980-84, although the statistics of some states cover somewhat different or longer periods of time. *See id.* The total

the malefactors of the bar paralleled by vigilance in applying the basic elements of procedural due process?

From the outset, American courts have been concerned about the due process implications of disciplinary proceedings. The early cases, in particular, recognized that disbarment can exact a heavy toll on a lawyer, and thus the judicial disciplinary power should be exercised with the greatest of due process care. In 1824, Chief Justice Marshall, discussing a lower court's disciplinary authority, noted that this judicial power "is one which ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession."[3]

The "great caution" that Marshall urged sprang from fear that the judiciary might exercise its control of the bar in an arbitrary manner, in disregard of the accepted norms of due process. As the Court later explained:

> The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.[4]

The thrust of this early concern was that the acknowledged power of courts to admit, discipline and disbar lawyers be exercised with full recognition of lawyers' due process right to be free of arbitrary action. Uncontrolled discretion, it was thought, begets arbitrary results. Total, arbitrary or tyrannical power over another's lawful pursuits is not to be vested in any person or in any tribunal in our form of government. Nowhere was such exercise of power considered more odious than when exhibited by a court towards a member of the bar in the course of a disciplinary proceeding.

When a lawyer is charged with misconduct in professional activ-

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number of cases discovered by the ABA was 2991. *Id.* Of that number, California accounted for 681 disciplinary cases, or 22.8%. Other states with significant numbers of cases were Florida (347 or 11.6%), New York (243 or 8.1%), Michigan (228 or 7.6%), Texas (225 or 7.5%), Illinois (198 or 6.6%), District of Columbia (126 or 4.2%), Arizona (96 or 3.2%), Massachusetts (92 or 3.1%), Tennessee (69 or 2.3%), and New Jersey (69 or 2.3%). *Id.* New Hampshire and Vermont reported no disciplinary cases in the 1980-84 period. *Id. See also* McPike & Harrison, *The True Story on Lawyer Discipline*, 70 A.B.A.J. 92 (1984) (reporting a 73% increase in sanctions from 1978 to 1982).

[3] *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824).

[4] *Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1856).

ities, the sanction of disbarment can devastate the lawyer's reputation and career, and thus "can be regarded in no other light than as punishment for such conduct."[5] As Justice Field noted, writing for the Court in *Bradley v. Fisher*,[6] the "punishment" of disbarment can decree poverty to the lawyer and destitution to the lawyer's family. And in his eloquent dissent in *Ex parte Wall*,[7] Justice Field further observed that when the judicial power to disbar is discretionary in nature

> there is in the hands of an unscrupulous, vindictive, or passionate judge, means of oppression and cruelty which should not be allowed in any free government. To disbar an attorney is to inflict upon him a punishment of the severest character. He is admitted to the bar only after years of study. The profession may be to him the source of great emolument. . . . To disbar him having such a practice is equivalent to depriving him of his capital. It would often entail poverty upon himself, and destitution upon his family. Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession.[8]

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[5] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866). In *Garland*, the Court, speaking through Justice Field, voided a congressional enactment excluding from the practice of law in federal courts those lawyers who had not taken an oath that they had given no aid or counsel to the southern cause during the Civil War. *Id.* at 374-80. Such exclusion was held to be a new punishment for past conduct. *Id.* at 377. Moreover, since Garland (who later became the Attorney General of the United States) had received a full presidential pardon, the Court held that he was relieved of all punishments and penalties (including exclusion from practicing law) stemming from his past conduct. *Id.* at 381.

[6] 80 U.S. (13 Wall.) 335 (1872). The Court ruled in *Bradley* that a defective disbarment order is a judicial act for which the judge is not liable to the attorney in a civil action for damages. *Id.* at 357. The attorney in that case had threatened the trial judge with "personal chastisement" for having insulted the attorney during the course of the trial of John Suratt for the murder of Abraham Lincoln. *Id.* at 334. Immediately after the trial terminated, the judge summarily ordered that the attorney's name be stricken from the roll. *Id.* Justice Field wrote that the judge erred in not issuing any show cause order, or affording the attorney any opportunity to be heard, before striking the attorney's name. *Id.* at 356-57. In holding that such a denial of due process was not compensable by way of a civil damage action, Justice Field commented on the devastating nature of a disbarment and on the principle that the power to disbar should be exercised only "for the most weighty reasons," following notice and ample opportunity for explanation and defense. *Id.* at 354-55.

[7] 107 U.S. 265 (1882). In *Wall*, the Court majority, in denying mandamus, ruled that the attorney had been accorded due process in the disbarment proceeding in the lower federal court, in that he had been given due notice and a trial and a hearing before the federal court. *Id.* at 290.

[8] *Id.* at 317-18 (Field, J., dissenting). Justice Field's dissent gives a dramatic account of the facts. A lynch mob had taken "one John, otherwise unknown" from

In more recent times the Supreme Court has echoed similar sentiments about the penal nature of disbarment, but has done so only sporadically. In *Spevack v. Klein*,[9] the Court described the "threat of disbarment and the loss of professional standing, professional reputation, and of livelihood," like the threat of criminal prosecution, as a powerful instrument for compelling self-incrimination by a lawyer; the fifth amendment accordingly precludes disbarment as a sanction for invoking the privilege.[10] The modern apogee of equating disbarment proceedings and criminal proceedings was reached in the 1968 ruling in *In re Ruffalo*.[11] There the Court repeated once again that disbarment, though designed to protect the public, "is a punishment or penalty imposed on the lawyer" and that disbarment proceedings "are adversary proceedings of a quasi-criminal nature."[12] Accordingly, said the Court, the lawyer undergoing disbarment proceedings is entitled to procedural due process.[13]

For the most part, disciplinary proceedings are under the control and supervision of state courts. Those courts, however, uniformly reject the United States Supreme Court's historic notion that such proceedings are criminal in nature and effect. They even reject the *Ruffalo* notion that such proceedings are of a quasi-criminal nature. Rather, state courts accept and follow the concept codified in

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a Florida county jail and hanged him from a tree in front of the courthouse steps. *Id.* at 292 (Field, J., dissenting). Wall, the lawyer, had not been charged with, or found guilty of, any participation in violation of Florida law. But a federal judge, who had seen the dangling corpse on his way to court, ordered Wall to show cause why he should not be disbarred for having engaged in, advised and encouraged the lynch mob. *Id.* at 292-93 (Field, J., dissenting). The show cause order stated that it was grounded on ex parte, unsworn statements of unidentified persons in whom the court had "the most implicit confidence." *Id.* at 292 (Field, J., dissenting). Wall denied all the charges. *Id.* at 294 (Field, J., dissenting). He also asserted that the lynching incident involved a high crime against the state, not against the court. *Id.* Nor did the incident occur in the presence of the court. *Id.* The court overruled these objections. *Id.* The judge, who "naturally felt great indignation at the lawless proceedings of the mob," premised his disbarment order on the testimony of but one witness, the court marshal. *See id.* at 294-95 (Field, J., dissenting). Justice Field described the testimony as "uncertain, insufficient and inconclusive" in identifying Wall as a participant or leader of the lynch mob. *Id.* at 295 (Field, J., dissenting). Nonetheless, the judge found such testimony sufficient to prove Wall's guilt " 'positively conclusive beyond a reasonable doubt.' " *Id.* at 295-96 (Field, J., dissenting). In Justice Field's view, "[n]othing could more plainly illustrate the wisdom of the rule that the accuser should not be the judge of the accusation." *Id.* at 295 (Field, J., dissenting).

9 385 U.S. 511 (1967) (plurality opinion).

10 *Id.* at 516.

11 390 U.S. 544 (1968).

12 *Id.* at 550, 551 (citations omitted).

13 *Id.* at 552.

Standard 1.2 of the American Bar Association's Standards for Lawyer Discipline and Disability Proceedings: "Lawyer discipline and disability proceedings are *sui generis*, and rules of procedure for civil, criminal, and administrative proceedings do not automatically apply."[14] Indeed, it is unclear whether the Supreme Court still believes, as it certainly did in the days of Justice Field and as it probably did when it decided *Ruffalo*, that disciplinary or disbarment proceedings are necessarily criminal in nature and impact, with consequent due process implications. The Court has not addressed the nature of disbarment proceedings since *Ruffalo*.[15]

Unquestionably, the rules and the procedures dealing with lawyer misconduct are more complex and sophisticated today than in the pre-*Ruffalo* period. But by insisting that attorney disciplinary proceedings are not truly criminal in nature, courts are able to avoid some of the stricter due process requirements that have achieved constitutional status in modern times. Thus, accused attorneys have no constitutional right to a jury trial. There is no right to remain silent before disciplinary tribunals. There is no requirement that the alleged misconduct be proved beyond a reasonable doubt, it being sufficient if the charges are established by "clear and convincing

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[14] STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS Std. 1.2 (1979). Many states follow standard 1.2 by holding that their disciplinary proceedings are *sui generis*, not criminal in nature, and that disciplinary sanctions are imposed not as punishment but to maintain "the integrity and purity of the bar." *See, e.g., In re* Logan, 70 N.J. 222, 227, 358 A.2d 787, 790 (1976). The United States Supreme Court has cited *Logan* for just this proposition. Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433 n.12 (1982).

[15] Justice Brennan, concurring in Middlesex Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982), cited *Ruffalo* in referring to "the quasi-criminal nature of bar disciplinary proceedings." *Id.* at 438 (Brennan, J., concurring) (citation omitted). Justice Brennan relied on the quasi-criminal nature of such proceedings as a factor that calls for "exceptional deference by the federal courts" before intruding into an ongoing state disciplinary proceeding. *Id.* Without referring to the *Ruffalo* "quasi-criminal" language, the majority opinion in *Middlesex* held that the abstention policies underlying Younger v. Harris, 401 U.S. 37 (1971), "are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex*, 457 U.S. at 432 (citations omitted). The state's interest in regulating the professional conduct of its lawyers was held to be extremely important. *Id.* at 434.

In Juidice v. Vail, 430 U.S. 327 (1977), the Court held that, for *Younger* abstention purposes, it matters not whether proceedings leading to a finding of contempt of court "is labeled civil, quasi-criminal, or criminal in nature . . . the salient fact is that federal-court interference with the State's contempt process is 'an offense to the State's interest . . . likely to be every bit as great as it would be were this a criminal proceeding.' " *Id.* at 335-36 (citation omitted). *See also* Erdmann v. Stevens, 458 F.2d 1205, 1210 (2d Cir. 1972) (applying the *Younger* abstention doctrine in light of the *Ruffalo* characterization of disbarment proceedings as being "of a quasi-criminal nature").

evidence."[16]

Yet there are certain due process rights that must be respected despite the *sui generis* nature of disciplinary proceedings. The accused lawyer, like any other citizen, is constitutionally entitled to fair notice of the charges. The lawyer has the right to a hearing on those charges before an unbiased tribunal. Generally speaking, the adjudicatory and prosecutory functions within the disciplinary tribunal must be separately performed by different persons. The lawyer has the right to be present at the hearing and to be represented by counsel of choice. Also possessed by the lawyer are the rights to examine all the evidence, to confront and cross-examine all witnesses, and to testify and offer counter-evidence.[17]

The presence or absence of these various due process factors, however, is not peculiar to lawyer disciplinary proceedings even assuming that they are non-criminal in nature. These factors are relevant in all kinds of civil proceedings where one's profession, occupation, license, or other substantial entitlement may be at stake. Moreover, since procedural due process is an elusive concept at best, the Supreme Court has rejected "any concept of inflexible procedures universally applicable to every imaginable situation."[18] What procedures are due depends upon the specific context and nature of the adjudication in question.

Consequently, the context in which lawyer disciplinary proceedings take place must be closely examined. Here we find a unique due process situation. Lawyers, for due process purposes, are quite unlike any other category of professionals or laypersons. Their rights to procedural due process depend not only upon constitutional doctrine but also upon their status as "officers of the court"—members of a profession totally subservient to the awesome inherent powers of the judiciary. Those powers are breath-taking and pervasive in scope, "starting with admission, ending with disbar-

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16 STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS Std. 8.40 (1979). The commentary accompanying Standard 8.40 states that the "clear and convincing evidence" standard is higher than "preponderance of the weight of credible evidence," yet not as stringent as "beyond a reasonable doubt." *Id.* commentary.

17 *See, e.g.*, *In re* Ruffalo, 390 U.S. 544, 550-51 (1968).

18 Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (citations omitted). *See also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); Hannah v. Larche, 363 U.S. 420, 442 (1960) (" 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.").

ment, and covering everything in between."[19]

Within the broad spectrum of inherent power over the practice of law, courts determine who can and cannot practice law, as well as the conditions under which one may be admitted to practice. They promulgate and then interpret and apply complex codes of behavior, which cover virtually every aspect of law practice. They establish procedures for investigating and prosecuting alleged violations of such codes. They sit in final and *de novo* judgment of those attorneys found either innocent or guilty by lesser disciplinary authorities, and determine the sanction to be imposed. They often sit in judgment of the moral and ethical character of the activities of lawyers, even those activities that are not directly related to the practice of law. Courts also have inherent and summary power to hold lawyers in contempt for various forms of disobedience to court orders or the dictates of courtroom decorum.

These examples of inherent power are by no means exhaustive. Nor should it be assumed that the exercise of any aspect of inherent power is necessarily subject to overt limitations. American courts are fond of citing and adhering to Lord Mansfield's comment that the purpose of the inherent judicial power to discipline is not to punish the lawyer but to determine if the lawyer "should continue a member of a profession which should stand free from all suspicion . . . [or] whether a man whom [the courts] have formerly admitted, is a proper person to be continued on the roll or not."[20] But as Lord Mansfield freely admitted, a determination that an attorney is or is not such a "proper person" calls on the court to exercise discretion. Once discretion gets a foothold in any kind of disciplinary process it tends to outweigh concern for protecting procedural due process interests.

Discretion also rears its head when courts view discipline as something other than a means of improving the public image of what should be an honorable profession free from all suspicion. If a court is determined, as most are, to protect the public from bad lawyers, or to incapacitate if not punish the offending lawyer, or to deter other lawyers from committing like offenses, courts have a full

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19 *In re* LiVolsi, 85 N.J. 576, 585, 428 A.2d 1268, 1272 (1981).

20 *Ex parte* Brounsall, 98 Eng. Rep. 1385 (1778). The Florida Supreme Court put the matter more bluntly, holding that a lawyer who had engaged in highly immoral conduct within his private family circle "well deserves" to be disbarred. Florida Bar v. Hefty, 213 So.2d 422, 424 (Fla. 1968). The court observed that it did "not think the conduct of this man is such that he should be allowed to mix with the honorable members of the profession and their families." *Id.*

arsenal of discretionary weapons. As Professor Wolfram has acutely noted:

> [M]ost courts probably conceive of their disciplinary role as one of discretion and creativity. The norms to be imposed are dynamic and flexible, as is true generally of exercising discretion in the common law. For many courts, that is much the same attitude found when they resort to the common-law inherent powers to adopt and enforce the lawyer codes.[21]

Indeed, we do find a high degree of discretion written into the modern codes of lawyer conduct. Not only are the codes liberally construed, unlike criminal codes, but they are liberally strewn with such imprecise concepts as engaging in "conduct that is prejudicial to the administration of justice,"[22] or conduct "involving dishonesty, fraud, deceit, or misrepresentation,"[23] or other conduct "that adversely reflects on his fitness to practice law,"[24] or "illegal conduct involving moral turpitude."[25] Federal courts of appeals can suspend or disbar their respective bar members for having been "guilty of conduct unbecoming a member of the bar of the court."[26] And many state courts have not forgotten or abandoned the old ABA Model Code disciplinary admonition that a lawyer "should

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[21] C. WOLFRAM, MODERN LEGAL ETHICS 86 (1986).

[22] MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1983) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (1981) [hereinafter MODEL CODE].

[23] MODEL RULES, *supra* note 22, Rule 8.4(c) (1985); MODEL CODE, *supra* note 22, DR 1-102(A)(4) (1981).

[24] MODEL CODE, *supra* note 22, DR 1-102(A)(6) (1981). This kind of conduct is not mentioned in the Model Rules.

[25] *Id.* DR 1-102(A)(3). The critical problem here is in defining "moral turpitude." Courts are hopelessly divided on that matter. The new ABA Model Rules avoid any reference to "moral turpitude" on the theory that it has no specific connection to fitness for the practice of law. By way of replacement, the Model Rules define professional misconduct to include the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1983). Query whether that description avoids all elements of discretion and subjectivity in determining whether the criminal act reflects adversely on the lawyer's fitness to continue the practice of law.

[26] FED. R. APP. P. 46(b). The Supreme Court has refused to find Rule 46(b) void for vagueness. It has defined the "conduct unbecoming" language as "conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." *In re* Snyder, 472 U.S. 634, 645 (1985) (citation omitted).

See generally Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C.L. REV. 671 (1979); Note, *Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions*, 65 IOWA L. REV. 1386 (1980).

avoid even the appearance of professional impropriety."[27]

Even the bar admission process, another instance of inherent judicial power in action, is laden with discretion. Every jurisdiction in the United States, as a prerequisite for admission to practice, requires that applicants possess "good moral character." The Supreme Court has acknowledged that this term is "unusually ambiguous . . . [and] can be defined in an almost unlimited number of ways . . . [to] reflect the attitudes, experiences and prejudices of the definer."[28] Yet the Court has authenticated the use of that elusive standard by the equally elusive notion that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law."[29] The Court has added the not very helpful thought that long usage of the good moral character requirement "has given well-defined contours to this requirement."[30] That long usage shows only that the requirement produces widely divergent results from case to case, and from state to state.[31] The contours of the requirement are anything but well defined.

In sum, a determination as to whether a given individual has displayed bad moral characteristics and whether there is a rational connection between those characteristics and the individual's fitness to practice law in the future compels the decisionmaker to use a good deal of discretion, subjectivity and amateur psychology. Discretion thus becomes an active ingredient in the bar admission process.

The courts have one final and conclusive answer to those lawyers who complain about the vagueness and the subjectivity that are written into the professional codes of behavior. It is an answer well expressed in Justice White's concurrence in *Ruffalo*: "Even when a

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27 MODEL CODE, *supra* note 22, Canon 9 (1981). The "appearance of impropriety" standard was not repeated in the later Model Rules because it was thought to be question-begging and possibly unconstitutionally vague. But some states, like New Jersey, have retained the "appearance of impropriety" standard in adopting modified versions of the Model Rules. *See, e.g.*, N.J.RULES OF PROFESSIONAL CONDUCT Rule 1.11(b).

28 Konigsberg v. State Bar, 353 U.S. 252, 263 (1957).

29 Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). The Court then framed the issue in the *Schware* case as "whether the Supreme Court of New Mexico on the record before us could reasonably find that he [Schware] has not shown good moral character." *Id.* After reviewing the record, the Court concluded that "[t]here is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." *Id.* at 246-47.

30 Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 159 (1971).

31 For a comprehensive survey of the use of the "good moral character" requirement, see Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment . . . includ[ing] conduct which all responsible attorneys would recognize as improper for a member of the profession."[32] Or as put by the Iowa Supreme Court, "guidelines setting standards for members of the bar need not and cannot meet the standard of clarity required of rules of conduct for laymen due to the training and specialized nature of the body being regulated."[33]

Lawyers, in other words, are a special breed. They are highly trained and responsible individuals. They are officers of the court.[34] They have responsibilities not only to the courts but to their clients, to the public and to the entire system of justice. They have an innate and educated sense of what is proper and improper conduct, perhaps acquired by some process of legal osmosis. They can read with their trained legal eyes and therefore understand what the Supreme Court has referred to as the " 'complex code of behavior' to which attorneys are subject," a code which somehow gives definiteness and clarity to the vague portions thereof.[35] As a result, in Justice Brennan's words, "Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts."[36]

In effect, courts have exercised their inherent power over attorneys to create a specialized society that, for due process purposes at least, is separate from the lay society. The Supreme Court performed a similar carving-out operation with respect to the military

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[32] 390 U.S. 544, 555 (1968) (White, J., concurring).

[33] Committee on Professional Ethics and Conduct v. Durham, 279 N.W.2d 280, 284 (Iowa 1979) (citations omitted).

[34] As noted in Supreme Court of New Hampshire v. Piper, 470 U.S. 273, 283 (1985), a lawyer is an "officer" only in the judicial or legal world; a lawyer is not an officer of the state in any political sense.

[35] *In re* Snyder, 472 U.S. 634, 644 (1985) (quoting *In re* Bithoney, 486 F.2d 319, 324 (1st Cir. 1973)). In *In re* Bithoney, the First Circuit, like the Supreme Court in *Snyder*, was dealing with the asserted vagueness of the "conduct unbecoming a member of the bar" standard embodied in Rule 46(b) of the Federal Rules of Appellate Procedure. *See In re* Bithoney, 486 F.2d 319, 324 (1st Cir. 1973). In finding that this language gives sufficient warning of the proscribed behavior, the First Circuit stated that "we are convinced that when placed in context, as part of a rule directed to a discrete professional group, the terms take on definiteness and clarity. The legal profession has developed over a considerable period of time a complex code of behavior and it is to that code that such words as 'conduct unbecoming a member of the bar' refer." *Id.*

[36] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 666 (1985) (Brennan, J., concurring in part and dissenting in part).

in *Parker v. Levy*.[37] There the Court held that the military is quite different from civilian society, and that the different character of the military community, members of which are trained in military customs and obligations, justifies a lower level of due process protection.[38] Thus a military officer cannot complain that the military code proscriptions of "conduct unbecoming an officer or gentleman" or actions "to the prejudice of good order and discipline in the armed forces" are unconstitutionally vague or overbroad, no matter how vague or overbroad these standards might be in the context of the civilian world. *Parker* is frequently cited by courts in rejecting claims that certain proscriptions in the lawyers' "complex code of behavior" are unconstitutionally vague or overbroad.

The lawyers' world has truly become a separate society, totally governed by the judiciary. The unlimited scope of the inherent power of courts to control the society of lawyers is explainable by the fact that the judiciary, in crafting this inherent power, have acquired all the powers of government, virtually free of any legislative or executive checks. When courts promulgate codes of conduct, they act in a legislative capacity.[39] When they initiate or authorize the initiation of disciplinary proceedings against lawyers, they act in their executive enforcement capacity.[40] And, obviously, when courts sit in judgment of disciplinary charges or hear appeals from lower court decisions in disciplinary cases, they perform a traditional adjudicative or judicial task.[41]

In political theory, the accumulation of all such governmental powers in the hands of any group of judges is a classic violation of the separation of powers concept. James Madison wrote in *The Fed-*

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[37] 417 U.S. 733 (1974).

[38] *See id.* at 756-58.

[39] Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731 (1980). The Court determined that the Supreme Court of Virginia, in enacting disciplinary rules, constituted a legislature and that the judges were acting in their legislative capacity. *See id.* The judges accordingly were entitled to legislative immunity from suit. *Id.* at 734. The Court also observed that the Virginia court, in asserting its inherent power to regulate the bar, "is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code." *Id.*

[40] *See id.* at 736. The Court also held that the Virginia judges, by virtue of their authority to initiate proceedings against lawyers, "were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were." *Id.* (footnote omitted). More recently, the Court has referred to the fact that state supreme courts possess "agency-like responsibilities over the organized bar." Patrick v. Burget, 108 S. Ct. 1658, 1662 (1988) (citation omitted).

[41] Supreme Court of Virginia v. Consumers Union, 446 U.S. at 734. Acting in their judicial capacity in resolving disciplinary cases, judges are entitled to their traditional immunity from suit. *See id.* at 734-35.

eralist that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[42]

We need not and do not here charge that the courts' exercise of inherent power to control and regulate lawyers is an exercise in tyranny, in violation of the separation of powers doctrine. It is enough to note that this inherent power is indeed composed of all governmental powers respecting the practice of law. In this context, courts legislate. They execute. They adjudicate. We can only trust that the courts use all these powers in a responsible fashion, eschewing the excesses that such concentration of power makes possible.

It follows that the lawyer charged with professional misconduct can expect and demand only that amount of procedural due process that the courts are willing to give. Even the constitutional principles of due process are what the courts say they are. There is no other organ of government that can relieve lawyers of any due process deficiencies the courts may visit upon them.

The point is not that courts have unduly limited the due process protections afforded lawyers accused of misconduct. What is important is that the kind and amount of due process that lawyers receive are the products of (1) the unlimited discretion that is built into the courts' inherent power to control the legal profession, and (2) the extent to which courts are willing to treat lawyers as a special and separate societal class, not entitled to quite all the due process protections that other professionals and other citizens enjoy. Within those two factors lie the answers to the questions posed at the beginning of this discussion. In other words, only the courts can determine how little or how much due process will be accorded the lawyer undergoing disciplinary proceedings.

Because so much discretion is embedded in this inherent power to control the legal profession, there is always the danger, as Justice Field described it, that courts will use the power as a "means of oppression and cruelty which should not be allowed in any free government."[43] Modern times have not been without examples of seeming abuse of such inherent power.[44] We can only hope that

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42 THE FEDERALIST No. 47, at 323 (J. Madison) (J. Cooke ed. 1961).

43 *Ex parte* Wall, 107 U.S. 265, 317 (Field, J., dissenting).

44 *See* Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone,"* 43 N.C.L. REV. 9 (1964); Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L.L. REV. 301 (1970). For recent instances of denials of procedural due process in the New York disciplinary system, see Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd sub nom.* Levin v. Gulotta, 425 U.S. 901 (1976).

courts will heed the observation of a wise judge that

> [t]here is no inconsistency between fair treatment of lawyers and maintenance of the long tradition of their discipline by the courts. There is no good reason why members of the legal profession, who have done so much to protect the constitutional rights of others, should be deprived of justice with due process in [disciplinary] hearings and appeals—rights available to all other professionals.[45]

Judge Weinstein's dissent in *Mildner*, contains a comprehensive and impressive accounting of the procedural due process rights of lawyers charged with professional misconduct. *See also In re* Steinberg, 137 A.D.2d 110, 528 N.Y.S.2d 375 (App. Div.), *leave to appeal denied*, 72 N.Y.2d 807, 529 N.E.2d 424, 533 N.Y.S.2d 56 (1988) (attorney disbarred without a hearing, on a charge that he had misled the bar examiners in admitting him to the bar 18 years earlier).

[45] Mildner v. Gulotta, 405 F. Supp. 182, 201-02 (E.D.N.Y. 1975) (Weinstein, J., dissenting).